Service Date: March 20, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF The Petition of	)	UTILITY DIVISION
AT&T Communications of the Mountain	)	
States, Inc. Pursuant to 47 U.S.C. Section	)	
252(b) for Arbitration of Rates, Terms,	)	DOCKET NO. D96.11.200
and Conditions of Interconnection With	)	
U S WEST Communications, Inc.	)	ORDER NO. 5961b

ARBITRATION DECISION AND ORDER

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BEFORE:

DAVE FISHER, Chairman
NANCY MCCAFFREE, Vice-Chair
BOB ANDERSON, Commissioner
DANNY OBERG, Commissioner
BOB ROWE, Commissioner

INTRODUCTION AND PROCEDURAL BACKGROUND

1. The Federal Telecommunications Act of 1996 (Act or 1996 Act), signed into law by President Clinton on February 8, 1996, initiated a sweeping reform of the telecommunications Industry in the United States.[1] Its purpose is to provide the benefits of competition to consumers by opening all telecommunications markets to competition. Conference Report accompanying S. 652, 104th Cong., 2nd session. The Act requires incumbent local exchange companies (ILECs) to negotiate interconnection agreements[2] with competitive local exchange carriers (CLECs) in order to facilitate competition in the telecommunications local exchange markets throughout the nation. AT&T Communications of the Mountain States, Inc. (AT&T) and U S WEST Communications, Inc. (U S WEST) began negotiating a Montana interconnection agreement after AT&T requested contract negotiations on June 20, 1996.

2. If the ILEC and the CLEC cannot reach agreement within the time frame specified in the 1996 Act, either party may petition the state commission[3] to arbitrate unresolved issues

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1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

2 CLECs can seek agreements with an incumbent LEC related to interconnection with the incumbent LEC’s network, the purchase of finished services for resale and the purchase of the incumbent LEC’s unbundled network elements. 47 U.S.C. §§ 251(c) and 252(a).

3 "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any state has regulatory jurisdiction with respect to intrastate operations of telecommunications carriers. 47 U.S.C. § 153(45). In Montana, the Montana

and to order terms consistent with the Act and the rules adopted by the Federal Communications Commission (FCC) as mandated by the Act. *See* 47 U.S.C. §§ 252(b) and 252(c). AT&T filed a petition with the Montana Public Service Commission (Commission) on November 22, 1996, asking the Commission to arbitrate unresolved issues between the parties pursuant to § 252(b) of the 1996 Act.

3. In a work session held on December 3, 1996 the Commission decided that it would act as an arbitration panel for this proceeding. The Commission also limited intervention to the Montana Consumer Counsel (MCC) and appointed Commission staff attorney Karen Hammel to act as Hearings Officer for procedural matters. The Commission granted AT&T's motions for a pre-arbitration procedural order and for a protective order, both subsequently issued on December 3, 1996.

4. U S WEST filed a motion on December 18, 1996, to modify the Procedural Order in this Docket. In this motion, U S WEST objected to the three calendar day deadline for objecting to discovery requests or objecting to the sufficiency of discovery responses in ¶¶ 9 and 10 of the Procedural Order, stating that this requirement would deny the parties due process of law and that five business days should be allowed, at a minimum. U S WEST also objected to ¶ 11 which required the party to file a response to the discovery request with the Commission even if it objects to the request. U S WEST argued that this mandated that the objecting party, simultaneously with raising an objection, waive the claim of privilege by providing privileged information to the Commission. In addition to claiming that it denies the parties due process of law, U S WEST also contended that ¶ 11 conflicts with the protections against unreasonable discovery embodied in the Montana Rules of Civil Procedure and incorporated by the Commission in its Procedural Order. U S WEST also objected to ¶ 21, stating that requiring parties to

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Public Service Commission has such jurisdiction.

bring to hearing any person who has answered a discovery request is not only unreasonable, but unlawful and in excess of the Commission's jurisdiction.

5. On December 23, 1996 the Commission acted on this motion and changed the requirement in the Procedural Order for objecting to discovery from three calendar days to three business days. The Commission also clarified ¶ 11, ruling that the information will be treated as privileged information, with access to the information restricted to the Commission, and that the information would be promptly returned to the party filing the information if the objection was later sustained. In overruling U S WEST's objection to ¶ 11, the Commission stated that the time limits of the 1996 Act require that delay be minimized during the pre-arbitration period and ¶ 11 is intended to facilitate the exchange of information in a timely manner.[4] *See* Notice of Commission Action, Docket No. D96.11.200 (Jan. 7, 1997). The Commission also overruled the objection to ¶ 21 as there are adequate procedural safeguards included in the Procedural Order to address the potential problems cited by U S WEST in the motion.

6. This arbitration proceeding has been conducted according to the contested case procedures outlined in the Montana Administrative Procedures Act (MAPA), § 2-4-601, MCA, *et seq.* A limited period for discovery took place due to the time constraints placed on this Commission by § 252 of the 1996 Act, which requires that the Commission's arbitration decision be issued no later than March 20, 1997. U S WEST's Response, according to the Act, was required to be filed by December 17, 1996. U S WEST filed its response on that date, thereby establishing the pre-arbitration discovery period as the time from December 17, 1996 until February 3, 1997, a period of less than two months. Prehearing conferences were held on January 10 and January 31, 1997, and discovery motions were considered at those conferences, with no Commission orders forthcoming on the motions. Throughout this proceeding, the Commission has urged the parties to work out their discovery disputes between themselves.

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[4] Despite the Commission's ruling on this objection, U S WEST has ignored this requirement in the Procedural Order and supplied no objectionable discovery information to the Commission when objections were subsequently made. It should be noted that neither party complied with this requirement, nor did they ask that it be waived for particular information.

7. The Commission published a public notice of the arbitration hearing throughout the U S WEST service territory in Montana, advising that intervention was limited and the MCC could be contacted to represent consumer interests. The arbitration hearing was conducted for eight days before the Commission, commencing on February 4, 1997 and continuing through February 14, 1997. Post-hearing briefs were due by February 19, 1997. Upon a review of the entire record in this proceeding, the Commission makes the following findings, conclusions and order.

PREHEARING DISCOVERY MOTIONS

8. At a work session held January 16, 1997 the Commission took action on U S WEST's first discovery motion filed on January 13, 1997, in which U S WEST objected to five data requests included in AT&T's Second Set of Data Requests. Sustaining the motion in part and overruling in part, the Commission ordered a partial response to AT&T Request - 029 and deferred consideration until January 22, 1997, of AT&T's Motion to Compel and for Sanctions received by telephonic facsimile on January 15, 1997. In response to AT&T's Motion to Compel, on January 22nd the Commission directed U S WEST to supply all information responsive to AT&T's requests or information that would provide AT&T with adequate instruction regarding access to information in the material it had already provided to AT&T. U S WEST's response remained controversial throughout the remainder of the prehearing period. The Commission deferred ruling on the request for sanctions until the prehearing conference scheduled for January 31, 1997, and did not subsequently order sanctions at the prehearing conference.

9. Both AT&T and U S WEST made other prehearing discovery motions prior to the second prehearing conference on January 31, 1997, which the Commission declined to act upon until issuing this Final Arbitration Order. On January 22, 1997, U S WEST filed a Motion to Compel related to its first set of data requests directed to AT&T, claiming that AT&T had waived its right to object to U S WEST's data requests by not timely objecting according to the requirements of the Procedural Order. AT&T filed a Second Motion to Compel on January 24,

1997, relating to the manner in which U S WEST had responded and was responding to its second set of data requests.

10. Many of the objections set forth in these motions related to the cost studies proposed by each party to be used for determining pricing for services and network elements. Earlier in this proceeding the Commission declined to rule on the question presented by both parties at the first prehearing conference held on January 10, 1997, as to whether the Commission would determine permanent or interim rates. The discovery practices by each party in this proceeding have not only made it difficult for the other party to frame its arguments and make its case, they have also made Commission decisions on permanent prices for services and network elements not merely impractical but a virtual impossibility. We address each party's unresolved motion in turn.

11. U S WEST's Motion to Compel responses to its First Set of Data Requests served on AT&T contended that AT&T had waived any objections to such requests by failing to timely object to them. AT&T conceded that it had not complied with the Procedural Order's requirement that it object to discovery requests within three business days, but argued that such failure was not sufficient grounds to compel the requests without a showing by U S WEST that it was entitled to the responses and that AT&T's objections lack merit. AT&T also argued that U S WEST was not prejudiced or placed at a disadvantage in preparing rebuttal testimony by its inclusion of the objections with its responses, despite the fact they were late.

12. U S WEST argued that according to ¶ 9 of the Procedural Order, the Commission had no option but to compel the responses. Paragraph 9 provides in pertinent part that, "Failure to timely object [to written discovery requests] will be a waiver of objections." However, ¶ 11 of the Procedural Order states:

> Parties are encouraged to attempt to resolve all discovery disputes between themselves, before filing objections. All motions regarding discovery should contain a statement explaining the efforts taken to resolve the issue informally, and a photocopy or restatement of the requests and responses. Discovery motions which do not include a statement explaining the efforts taken to

> resolve the issue informally are subject to denial without substantive consideration of the merits. . . .

The Procedural Order established by the Commission gives the Commission two options--it can either compel AT&T's responses, or it can deny U S WEST's motion without substantive consideration of the merits because U S WEST failed to explain the efforts taken to resolve the issue informally.[5] Much of the information U S WEST requested from AT&T in its data requests and to which AT&T objected and did not provide appears to be material which should be considered on the merits before any motion to compel should be granted. While many or all of the voluminous objections made by AT&T to U S WEST's extensive data requests may have merit, even if the Commission could consider them on the merits, there simply would have been no opportunity to do so due to the time constraints. Unfortunately, the Procedural Order does not permit consideration on the merits under these circumstances. Denial of the motion is preferable to compelling the sort of voluminous information requested by U S WEST, particularly where U S WEST did not argue that it would be prejudiced by failure to grant the motion. U S WEST's Motion to Compel is denied.

13. AT&T's Second Motion to Compel requested that the Commission immediately order U S WEST to respond to all the data requests and noted that U S WEST had been providing answers to the requests as they became available. AT&T requested that U S WEST be ordered to fully respond immediately to AT&T's second set of data requests. AT&T explained that at the time of filing the motion and also at the prehearing conference, U S WEST's responses were still "trickling out" and being supplemented, and that while it appreciated U S WEST's efforts to do this as information became available, it was unable to fully review U S WEST's responses for completeness and to file any objections it may have to them.

14. At the prehearing conference, the Commission did not immediately require U S WEST's response as it appeared that U S WEST and AT&T were in fact attempting to resolve

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[5] There is no indication in the record that U S WEST made any attempt to resolve the matter informally.

the problems between themselves. Further, AT&T's motion stated it was filing it primarily to ensure that it would not waive any objections to U S WEST's responses to the data requests. AT&T supplemented its first Motion to Compel and for Sanctions on January 31, 1997, the date of the second prehearing conference. AT&T stated that U S WEST's failure to adequately respond to AT&T's data requests could not be remedied and, therefore, the only available sanction is to strike the relevant testimony. AT&T listed the portions of testimony of D. M. Gude, Robert Harris, Robert Bowman, and William Fitzsimmons which it argued must be stricken. AT&T renewed its objections at the arbitration hearing and the Commission granted a continuing objection effective throughout the hearing for testimony affected by the motion.

15. The Commission recognizes the inherent difficulty created by the requirements of the 1996 Act as regards discovery in any arbitration proceeding, particularly one such as this which encompasses multitudinous issues and subissues and affords little time within which to complete the proceeding and render a final decision. The Commission's decision to establish interim rates appears to be the only practical method of dealing with the problems concerning discovery. A separate proceeding will be established within which there will be adequate time to develop a sufficient record with input from appropriate parties that will enable the Commission to make a proper determination of prices.

16. The testimony requested to be stricken relates to U S WEST's cost models and its criticism of the AT&T models and bears on the determination of permanent rates. Section 252(b)(4)(C) of the 1996 Act requires the Commission to resolve each issue set forth in the petition and the response by imposing appropriate conditions in resolving the arbitration. An appropriate condition in this case is the imposition of interim rates with permanent rates to be established in a separate cost proceeding which will allow adequate time for development of the issues. Striking substantial amounts of relevant testimony, as requested by AT&T, is not a preferable remedy and is not the only available remedy for insufficient responses from U S WEST. The Commission is mindful of the difficulties created by the discovery phase of this proceeding. Because the Commission establishes interim rates herein and will revisit the cost

models prior to setting permanent rates, AT&T's second Motion to Compel and for Sanctions is denied.

ARBITRATION DECISION STANDARD

17. In resolving the issues remaining in this arbitration and imposing appropriate conditions upon U S WEST and AT&T, the Commission must (1) ensure that the resolution meets the requirements of § 251 of the Act, including any legally enforceable regulations prescribed by the FCC pursuant to that section; (2) establish any rates for interconnection, services, or network elements according to the pricing standards in § 252(d) of the Act; and (3) provide a schedule for implementation of the terms and conditions. Section 251 of the Act requires that rates, terms, and conditions for interconnection and network elements be just, reasonable and nondiscriminatory, and that any telecommunications service offered at retail to subscribers must be offered for resale at wholesale rates. In addition, § 252(e)(3) of the Act provides that nothing in § 252 prohibits the Commission from establishing or enforcing other requirements of state law, including requiring compliance with intrastate telecommunications service quality standards or requirements.

18. Congress has specifically stated in § 252(c)(1) of the Act that the Commission's resolution and conditions must meet the requirements of the FCC's regulations adopted pursuant to Congressional direction. It is not enough that the resolution and conditions merely comply with § 251 of the Act.

19. The FCC adopted regulations implementing § 251 of the 1996 Act. *See* In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket 96-98, FCC 96-325 (released Aug. 8, 1996) ("FCC Interconnection Order" or "FCC Order"). Many appeals ensued and the Multidistrict Panel consolidated them for consideration by the United States Court of Appeals for the Eighth Circuit (8th Circuit). On October 15, 1996, the 8th Circuit issued an order staying the following parts of the FCC Interconnection Order: Appendix B - Final Rules: (1) §§ 51.501-51.515, relating to pricing network elements, and interconnection; (2) §§ 51.601-51.611, relating to avoided cost discount rates for resale; (3) §§ 51.701-51.717, relating to pricing reciprocal transport and termination;

and (4) § 51.809, relating to the availability of contract terms to other requesting carriers under § 252(i) of the Act. The Court also stayed a portion of the FCC's September 29, 1996 Order on Reconsideration, which established a default proxy range for states to price line ports for delivery of residential and business exchange service. On November 1, 1996, the Court issued an order lifting the stay with respect to § 51.701, § 51.703, and§ 51.717. *See* Order Granting Stay, slip op. (8th Cir.) (Oct. 15, 1996), *affecting the FCC's pricing and "pick and choose" rules and not the entire Order in* Iowa Utilities Board, et al. v. FCC, No. 96-3321 (and consolidated cases), appealing In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket 96-98, FCC 96-325 (released Aug. 8, 1996), and *see* Order Lifting Stay In Part, (8th Cir.) (Nov. 1, 1996), *modifying the stay entered on Oct. 15, 1996, and affecting CMRS and LEC interconnection.*

20. Among the arguments on appeal, and the one which the Court found persuasive, was the position taken by many state commissions and some of the ILECs that the FCC improperly usurped state jurisdiction when it issued pricing regulations affecting intrastate rates. The Court stated, "Petitioners have demonstrated that they will likely succeed on the merits of their appeals based on their argument that, under the Act, the FCC is without jurisdiction to establish pricing regulations regarding intrastate telephone service." *See* Order Granting Stay, slip op. at 16. This Commission has no legal obligation to apply the prices, methodologies or other directives in the stayed portions of the FCC Interconnection Order. Much of the FCC Interconnection Order is not stayed, however, and is binding on the Commission's resolution of the issues in this proceeding.

21. U S WEST contends that the Commission does not have to follow the FCC Order and may reject portions of it if it believes they conflict with or are inconsistent with the 1996 Act. These arguments are addressed separately in the discussions of particular issues below. We believe it is inappropriate to reject unstayed portions of the FCC Interconnection Order because the 8th Circuit presently has many of these issues before it in the various consolidated appeals and will rule on them in the near future. Decisions on the effect of the FCC Interconnection

Order are properly left to that Court. Rulings of this Commission in this proceeding which are not consistent with the ultimate decision on appeal will not stand.

RESOLUTION OF ARBITRATED ISSUES

22. Over 700 issues were initially raised in the parties' negotiations. According to U S WEST's response to the petition, over 370 of the issues had been resolved by the time AT&T filed the petition. The parties continued to negotiate their differences, and by the time the hearing began on February 4, 1997, identified 82 issues set out in a matrix, some parts of which had been settled or tentatively settled between them.

The Contract in general--form and content

Parties' positions and Commission decision: The parties cannot agree on the contract format; i.e., the degree of specificity that should be included therein. AT&T proposes a thorough, detailed agreement that addresses as many issues and potential issues as possible, in order to minimize future disputes between the parties. U S WEST's proposal is a format which includes general principles and is much less detailed, and would require negotiation of the details at a later date. The Commission chooses the AT&T format as being more consistent with the purposes of the 1996 Act. The AT&T contract is adopted except as contrarily expressed below, with modifications to reflect the Commission's resolution of the remaining issues. We are not adopting the entirety of the AT&T contract language. To the extent there is insufficient clarity in any part of this Order concerning a contract provision, the language from AT&T's contract should be used or adapted to the Commission decision. Once the agreement is completed, the Act requires that the Commission approve an interconnection agreement adopted by arbitration within 30 days of its submission to the Commission for approval.

Discussion: U S WEST claims that (1) the Commission has no authority to adopt AT&T's contract because all of the terms and conditions were not properly placed before the Commission in the arbitration, and (2) certain provisions in AT&T's proposed contract are outside the authority of the Commission.

Can the Commission decide the terms and conditions included in AT&T's contract? AT&T's petition included its proposed contract as an attached exhibit. U S WEST argues that this was insufficient to place all issues or language before the Commission. It argues further that a number of the provisions included in AT&T's contract fail to meet the substantial evidence standard which would apply to the arbitration decision on appeal. U S WEST claims that because AT&T only introduced testimony that highlighted key issues in dispute and did not identify with specificity all of the terms and conditions of the proposed agreement as disputed issues or provide testimony in support of all terms and conditions of the agreement, it would be unconstitutional for the Commission to impose provisions of the contract when no evidence has been adduced on those provisions.

Section 252(b)(2)(A) of the Act requires the petitioner to provide the Commission with "all relevant documentation concerning (i) the unresolved issues; (ii) the position of each party with respect to those issues; and (iii) any other issue discussed and resolved by the parties." The other party has the opportunity to respond to the petition and provide additional information. 47 U.S.C. § 252(b)(3). The Act authorizes the Commission as arbitrator to resolve all the issues set forth in the petition and the response and to impose appropriate conditions upon the parties to the agreement. 47 U.S.C. § 252(b)(4)(C).

AT&T filed its proposed contract and U S WEST's proposed contract with its petition as part of the relevant documentation. AT&T's petition included an express request to adopt the entire contract in the Commission's final arbitration decision. On the final day of the hearing, AT&T's witness Richard Thayer stated he was testifying specifically about Matrix Issues 65, 66 and 78, which relate to the form of the agreement, arbitrator fee awards, and the contract structure, respectively. AT&T continued to advocate adoption of its contract throughout this proceeding. Clearly the issue of contract format and structure is before this Commission for resolution.

U S WEST's first preference is for the Commission to rule on the unresolved issues and direct the parties to prepare a contract incorporating these decisions. Its second preference is for the Commission to adopt its own proposed contract which, according to U S WEST witness Laura Ford, is sufficient for AT&T to get into the business, as demonstrated by agreement with other parties. Ms. Ford further testified that trying to merge provisions from both contracts into one agreement had not been successful in Utah and she knew of no state in which the state commission had elected not to choose a contract where U S WEST and AT&T had subsequently agreed on a single contract. She testified that trying to mesh contracts "doesn't work unless you adopt all of the AT&T's provisions. If you try to put some ... [U S WEST's] own in there, you end up with a mess."

The record supports a conclusion that one of the contracts must be adopted. The Commission finds that this issue has been placed properly before it for resolution, that it is not likely that the parties will be able to agree on a single contract if the Commission does not choose one format over the other, and that AT&T's contract is more specific and will require less future interpretation. Section 252(b)(3) gives the non-petitioning party, here U S WEST, the opportunity to respond to the other party's petition and to provide "such additional information as it wishes" to the Commission. This provision and the ongoing opportunity to provide information regarding its position throughout this proceeding have provided ample time for U S WEST to make its position known. U S WEST cannot fail to respond fully and reasonably to an issue clearly identified by AT&T and then later claim that the Commission's decision is unconstitutional because information and arguments solely within U S WEST's control were not provided or were not advocated.

The federal Act permits the Commission to require the parties to provide such information as may be necessary for the state commission to reach a decision on the unresolved issues. 47 U.S.C. § 252(b)(4)(B). The federal Act requires the Commission to resolve the issues set forth in the complaint. The Commission expressed concerns about resolving this issue at the first prehearing conference held on January 10, 1997. U S WEST was aware that the Commission was struggling to resolve it and did not provide further information. This leads us to conclude that U S WEST had no substantial objection or significant problem with the portions in AT&T's contract that it did not address and that the gravamen of U S WEST's argument concerned whether the level of detail in AT&T's contract was too specific.

U S WEST also argues that § 252(c) of the Act limits the matters at issue in an arbitration to § 251, § 252(d), and the establishment of an implementation schedule, and the Commission has no duty to resolve issues or disputes over proposed interconnection agreement language. Our reading of § 252(c) is that it sets forth the standards by which the Commission is to resolve the arbitration and it is not meant to and does not limit the matters that may be arbitrated. Section 252(b)(4)(A) limits Commission consideration; it states that a state commission shall limit its consideration in an arbitration "to the issues set forth in the petition and in the response, if any...." Moreover, § 252(e)(5) of the Act provides that if the state commission fails to act to carry out its responsibility under § 252, the FCC, after notification, "shall assume the responsibility of the State commission ...with respect to the proceeding or matter and act for the State Commission." Thus, if the Commission fails to resolve every issue in dispute as set forth in the petition and the response, there is the potential that the issue could be resolved by the FCC.

Congress did not intend to prohibit the state commissions from imposing contract terms other than those for specific pricing and interconnection requirements. It takes much more than that to facilitate the development of competition in the monopolistic local exchange market. Even if the Commission adopted the pricing and interconnection terms proposed by a new entrant, such terms would not make entry easy for the new entrant if the incumbent wished to delay the new entrant’s market ingress. Clarity of terms and sufficient detail to avoid lengthy and numerous disputes is likely to speed the transition to competition. This Commission’s duty, according to Montana law as well as the federal Act, is to encourage competition and to exercise its authority in a manner "that will allow an orderly transition from a regulated telecommunications industry to a competitive market environment." Section 69-3-802, MCA. Miring down the new competitor--anxious to acquire market share--with potential negotiating roadblocks is inconsistent with the express goals of federal and state law.

For the same reasons, it is crucial that the incumbent not be permitted to affect the public’s perception of the new entrant’s ability to provide service, and thus prevent it from gaining market share. The new entrant, be it AT&T or a newly formed company with few financial resources, must be able to resolve disputes efficiently and thus requires as much clarity as possible. It also needs some means of assuring performance by the incumbent.

The Act expresses no limits on the issues that negotiating parties may bring to arbitration. Clearly, Congress must have been aware that state commissions would be asked to fill in many of the details important for competitive entry. Section 252(b)(1) permits state commissions to arbitrate "any open issues" and to impose appropriate conditions in arbitrations. If the parties cannot agree on the terms and conditions of their agreements, then state commissions must supply them so as not to delay the development of competition.

The Act also permits the Commission to "proceed on the basis of the best information available." 47 U.S.C. § 252(b)(4)(B). That is what the Commission has done by adopting AT&T's detailed and comprehensive agreement with modifications necessary to comply with the decisions contained in this Order. AT&T's contract is more complete and pro-competitive than U S WEST's contract. This Commission will have 30 days in which to approve the final submission from the parties. If the Commission were to direct the parties to incorporate its decisions in another contract, it would be faced with choosing between two widely dissimilar contracts at the approval phase, which cannot extend beyond 30 days. Such a course of action makes little sense. U S WEST has had ample opportunity to object to the items in the AT&T contract that it finds unreasonable. By adopting the AT&T contract, U S WEST is not foreclosed from arguing in the approval process or on reconsideration that specific contract provisions should not be included. However, more than a mere assertion that it is too thick or contains too many pages will be required.

We are incorporating a method of reconsideration in this proceeding that varies from the usual method of Commission reconsideration of one of its orders. The period of reconsideration is the appropriate means for providing further argument on contract terms and conditions which the Commission adopted during the arbitration proceeding. We conclude that a predetermined period for reconsideration of this arbitration decision, because of its potential effect and specifically because of the decision to adopt AT&T's contract, is an appropriate approach to ensure that U S WEST has adequate opportunity to address specific, significant and consequential areas of concern in the contract as adopted. However, the opportunity for reconsideration is not a vehicle by which U S WEST may attempt to introduce additional evidence which should have been provided to AT&T and the Commission prior to the Commission's decision in this Docket.

ARM 38.2.4806 sets forth the post-order procedures and standards for Commission reconsideration of the order. ARM 38.2.4806 includes liberal standards for such reconsideration, which should not as a general rule be applied or used as we are using them in this proceeding. However, this is not the usual Commission order, and because of its complexity, we are also waiving the provision in ARM 38.2.4806(5), which provides that a motion for reconsideration will be deemed denied if not acted upon within 10 days, and we are providing for a response period to allow comment or argument on motions.

<u>Does the Commission have authority to order the inclusion of AT&T’s proposed liquidated damages clause</u>? U S WEST also argues that the Commission has no authority to approve a liquidated damages clause because it has no statutory authority to levy a fine or other financial penalty against a regulated telecommunications provider. U S WEST points to §§ 69-3-206 and 209, MCA, which require the Commission to maintain an action in civil court for purposes of recovering fines or penalties. These sections of Montana law are aimed at a public utility’s failure to provide to the Commission information that may be required by Montana law, failure to permit examination of books, accounts, records, or papers relating to the utility’s business, and violations of public utility laws or orders made in the course of the Commission’s regulatory operations. In contrast, he interconnection contract between AT&T and U S WEST is a commercial contract entered into by federal mandate. It is completely reasonable to include such provisions in this sort of contract and, as explained above, this Commission may impose terms and conditions to resolve open issues identified by the parties.

Although U S WEST concedes that the Commission may approve a liquidated damages clause in a contract, it argues that the Commission cannot decide this issue. We see no difference in the power to approve a liquidated damages clause and the power to impose such as a contract term in resolving open issues, which is the distinction made by U S WEST. Liquidated damages are not fines which would revert to the State’s general fund, they are contract damages specified in the contract which are designed to encourage performance according to the terms of the contract, and which may eliminate a party's having to initiate a breach of contract action in court for the purpose of obtaining money damages. By approving this term, the Commission is not imposing damages.

Whether or not the liquidated damage clause would be upheld as valid is not an issue for the Commission to decide, but for a court should it be challenged. This Commission should not approve a liquidated damages clause that appears to be a penalty, however. Montana law permits parties to a contract to include a clause fixing liquidated damages when, from the nature of the case, it would be impracticable or extremely difficult to fix actual damages. Section 28-2-721, MCA. Liquidated damages, to be valid, must be reasonably related to the actual damages sustained. *See, e.g.*, Morgen and Oswood Construction Co. v. Big Sky of Montana, 171 Mont. 268, 557 P.2d 1017 (1977).

The arguments made by U S WEST against the liquidated damages provision argue that the Commission cannot arbitrate this issue. If the Commission is precluded from arbitrating this issue, U S WEST would essentially be able to predetermine the outcome of the disputed term. This was not the intent of Congress. As previously stated, § 252(b)(1) of the Act permits a party to petition a state commission to resolve "any open issue." The Act does not grant the Commission the authority to arbitrate, but it forms the basis for our authority. Section 252(b)(4)(C) of the Act directs that, "The State commission shall resolve each issue set forth in the petition and the response . . . by imposing appropriate conditions . . . upon the parties to the agreement . . . ." Nowhere in the Act does it limit state commission arbitration authority to specific regulatory provisions under state law. The Supremacy clause of the Federal constitution makes Federal law "the Supreme Law of the Land," which state courts must enforce. The United States Supreme Court has held that Congress can require a state agency, if the agency has regulatory jurisdiction, to hear and determine causes arising out of the federal Public Utilities Regulatory Policy Act. *See* Federal Energy Regulatory Commission v. Mississippi, 102 S.Ct. 2126 (1982). Thus, where the Commission has regulatory jurisdiction, federal law as well as state law must be applied, and where Congress has preempted state law, the federal law prevails. Therefore, this Commission has authority and responsibility to regulate utility matters in Montana, and it is properly empowered to fulfill the arbitration role created by the 1996 Act.

We agree with AT&T that performance standards and the associated liquidated damages provisions are necessary to implement the Act. Among other things that are relevant to this issue, the Act requires that an ILEC provide quality of service to CLECs that is equal to that it provides itself. For new competitors to gain market share, it is critical that performance standards be enforceable by adequate remedies. Without monetary incentive, ILECs may discourage or inhibit competition by providing inferior services to new entrants. Performance standards are necessary. Without effective and efficient enforcement mechanisms, they are meaningless.

U S WEST has argued that the amount is an unreasonable estimate of the actual damages for a breach. The Commission agrees that it would be impracticable or extremely difficult to fix the actual damages and thus liquidated damages are an appropriate remedy. AT&T's request for adequate quality standards and performance penalties in the form of liquidated damages is reasonable in light of the potential difficulties in this new era of local competition. This is not the ordinary sort of commercial contract where both parties have something to gain by negotiating and thus are willing to compromise. U S WEST as a monopoly provider is being forced to permit new entrants the opportunity to garner market share. Although U S WEST will be permitted to enter the interLATA long distance market when it has met the competitive checklist in § 271 of the Act, it has no short term reciprocal incentive to negotiate a contract that will ease market entry. U S WEST has participated in these negotiations and the arbitration because the 1996 Act decrees that it must.

<u>Performance standards</u>.

Performance standards are as set forth in this Order and in the agreement between the parties, which should reflect the Commission's decisions and the standards discussed herein.

<u>SPECIFIC FINDINGS AND CONCLUSIONS ON MATRIX ISSUES</u>

23 The issues presented for arbitration can be grouped according to the following general categories: (A) Interconnection and Collocation; (B) Extent of Unbundling; (C) Resale;

(D) Electronic Interfaces/Operational Support Systems; (E) Local Number Portability; (F) Access Issues; (G) Dialing Parity and Access to Number Resources; (H) Ancillary Services and Branding; (I) Service Quality/Business Processes; (J) Dispute Resolution; (K) Pricing for Unbundled Elements, Interconnection, and Collocation; and (L) Contract Term and Other Miscellaneous Issues. Issues identified by the parties were integrated by them in a "matrix" to facilitate reference to the ongoing status of negotiations. The matrix was updated over time as more issues were stipulated or resolved, with a revised matrix provided at the start of the hearing on February 4, 1997, and further revisions filed with post-hearing briefs. A copy of the most recent matrix is attached to this document as Attachment "1."

A. Interconnection and Collocation (Issues 1-13).

Interconnection is the physical linking of different carriers' networks for the mutual exchange of traffic. It allows customers of one carrier to complete calls to customers of another carrier. Collocation refers to the ability of a carrier to place equipment in the central office or other location of another carrier in order to obtain interconnection or access to unbundled elements. This can be done "physically" or "virtually." With physical collocation, a carrier may rent space in the ILECs central office in which to place and maintain its own equipment. With virtual collocation, the ILEC places and maintains equipment in the central office on behalf of the other carrier.

U S WEST and AT&T have reached substantial agreement on matrix issues 4 (two-way trunking), 11 (interconnection with other collocators), and 13 (collocation space). The remaining issues can be further grouped into three categories: (1) the type of equipment AT&T may collocate (issues 6, 9), the premises at which U S WEST will permit collocation (issues 1, 3, 5, 6, 7, 8, 10), and (3) the need for a standard ordering procedure for interconnection requests (issues 2, 12).

1. Types of Collocation and Collocated Equipment.

a. Issue 6 - Types of Collocation - This issue no longer appears disputed as both parties state that U S WEST is obligated to provide virtual and physical collocation or mid-span meets. The remaining disagreement relates to U S WEST's resistance to allowing generic access to controlled environmental vaults (CEVs) and environmental huts for purposes of collocation. This is addressed in our discussion and decision of Matrix Issue 10.

b. Issue 9 - Types of Collocated Equipment - The primary dispute regarding the equipment AT&T may collocate at U S WEST premises is whether AT&T may collocate remote switching modules (RSMs).[6] The Commission concludes that the Act requires such collocation.

U S WEST contends that collocation of RSMs is not mandated by the FCC Order, is not necessary for interconnection or access to unbundled elements, it creates a significant threat of bypass of switched access services due to potential close proximity to other non-IXC CLECs, and it will exacerbate space limitation problems in U S WEST end offices.

Section 251(c)(6) requires an ILEC to provide for physical collocation of "equipment necessary for interconnection or access to unbundled network elements," unless the incumbent proves that physical location is not practical for technical or space reasons. The FCC Interconnection Order discusses this issue at ¶¶ 578-581. The FCC concluded that the use of the word "necessary" in § 251(c)(6) of the Act for purposes of that section does not mean "indispensable" but rather "used" or "useful," stating that this interpretation is most likely to promote fair competition consistent with the purposes of the Act. FCC Interconnection Order, at ¶ 579. The FCC stated further that, "A strict reading of the term "necessary" in these circumstances could allow LECs to avoid collocating the equipment of the interconnectors' choosing, thus undermining the procompetitive purposes of the 1996 Act." The FCC Order provides that whenever a carrier seeks to collocate equipment for purposes within the scope of § 251(c)(6), the ILEC must

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[6] RSM is AT&T's choice of terminology; U S WEST refers to this equipment as remote switching units (RSUs).

prove such equipment is not "necessary" according to the FCC's definition for interconnection or access to unbundled network elements. The FCC also stated that state commissions may designate specific additional types of equipment that may be collocated pursuant to § 251(c)(6). FCC Interconnection Order, at ¶ 580.

The FCC does not require collocation of equipment necessary to provide enhanced services nor does it impose a general requirement that switching equipment be collocated. However, if the Commission determines that the particular equipment is actually used for interconnection or access to unbundled elements, the incumbent has the burden to prove that the particular equipment is not used for these purposes. U S WEST argues that the record establishes that the RSM is switching equipment and it is not "primarily used" for interconnection or access to unbundled elements. The record establishes that AT&T proposes to use RSMs to interconnect with U S WEST's network and access unbundled elements.

Commission Decision. The Commission finds that U S WEST has not met its burden to prove that RSMs are not "necessary," as interpreted by the FCC, for interconnection or access to unbundled elements. Even though the equipment may be used for switching as well, if the equipment is used for interconnection or access to unbundled elements, it must be collocated upon request from AT&T. In addition, the record does not establish that such collocation is technically infeasible.

U S WEST has raised a significant concern about the possibility that AT&T could use this collocated equipment for toll access bypass. AT&T agrees not to use RSMs to bypass access charges. The Commission finds that this is an important restriction and the agreement must specifically state that RSMs may not be used to bypass access charges. The AT&T contract at Attachment 4, § 2.2.4(a) should be revised to delete the words "it deems" from the first line.

2. Premises at which U S WEST will permit collocation. (Issues 1, 3, 5, 7, 8, 10)

Although U S WEST's post-hearing brief expresses concerns about the definition of premises, it is unclear whether U S WEST still disputes that definition. However, this Commission has adopted the FCC's definition of "premises" in its own rules and this part of the FCC's rules is not affected by the 8th Circuit stay. *See* ARM 38.5.4002(18).

After initially taking the position that it would permit collocation only at its end offices and tandems, U S WEST has now agreed to permit collocation at other premises as required by the FCC Order. However, according to the testimony of Cheryl Gillespie, U S WEST would require AT&T to use the BFR process for all requests for collocation at points other than end offices and tandems. The issue remaining is whether AT&T must use the BFR process to collocate at a vault or other location away from the central office. The Commission concludes the BFR process is not appropriate for this purpose.

Section 251(c)(6) requires collocation only where technically feasible. Paragraph 575 of the FCC Order provides that ILECs are not required to physically collocate equipment in locations where it is not practical for technical reasons or because of space limitations and virtual collocation is required only where technically feasible. Placing the burden to prove technical infeasibility on U S WEST is consistent with § 251(c)(6) of the Act, which imposes a duty on U S WEST to collocate where technically feasible. The BFR process is not consistent with the Act's presumption that U S WEST will open its particular premises to collocation. U S WEST has the burden to prove it is technically infeasible or not practical for space reasons to collocate. It argues that because space limitations may exist, the Commission cannot make a blanket determination that collocation at any U S WEST premise is technically feasible. The Commission is not making such a determination here and will address technical infeasibility when and if the issue is properly raised before the Commission.

a. Issue 1 and Issue 3 - Points of Interconnection.

The only remaining dispute on these matrix issues appears to be language contained in AT&T's proposed contract at Paragraph 9.2 in the "Warranties" section, to which U S WEST objects. U S WEST contends that the last two sentences of that section, requiring U S WEST to provide an alternative interconnection point (IP) if the requested IP is not technically feasible, go well beyond the requirements imposed by the 1996 Act and the FCC's rules and could circumvent other legal and regulatory relief.

The Commission finds no support for AT&T's position in the references to the Act and FCC rules provided by AT&T or otherwise. We agree with U S WEST that this requirement for an alternative IP imposes obligations on it that are not required by the Act or the FCC Interconnection Order. The last two sentences of AT&T's § 9.2 must be deleted.

b. Issue 1a - Bona Fide Request.

According to AT&T and U S WEST, agreement on the BFR process language has been reached, but they still disagree on the application of the process. AT&T believes that once the process is applied to a particular circumstance, subsequent ordering under the same circumstances should become standard. U S WEST contends the process must be done on a case-by-case basis and that knowledge will be gained through experience and the time required to process requests will be reduced.

The Commission finds that, to the extent possible, U S WEST should standardize its ordering processes. There is not enough information at this time for the Commission to make a ruling on the specific circumstances under which a particular type of request or order should become standard, but U S WEST should not use the BFR process to unnecessarily delay any request by AT&T for elements or services that have substantially been addressed by previous BFR processes.

c. Issue 2 - Ordering process.

AT&T contends that there must be a standard ordering process to be followed for each interconnection request and that U S WEST should commit to meeting any request for interconnection within a specific time frame under standard terms and conditions. AT&T further states that it has requested a proposal from U S WEST for such a procedure but U S WEST has not provided one. AT&T includes a proposed ordering process for interconnection in Attachment 5 to its contract. U S WEST proposed an interconnection ordering process in § 5.10 of its proposed interconnection agreement. U S WEST's § 5.10 provides that U S WEST and AT&T must negotiate points of interconnection on a central office by central office basis.

U S WEST's agreement does not include a standard ordering process for interconnection requests. U S WEST's proposal appears to contemplate interconnection only at limited locations. AT&T's proposed ordering process does not include a procedure for ordering interconnection. Its Attachment 5 relates only to the ordering of unbundled network elements and combinations of unbundled network elements.

We conclude that neither of the proposed ordering processes is acceptable. The parties shall revise AT&T's proposed ordering process in Attachment 5 to include a standard interconnection procedure for each of the interconnection points required by the FCC. The procedure must incorporate specific time frames and standard terms and conditions.

d. Issue 3a - Backhaul.

The backhaul issue refers to the method of transport required to deliver traffic to the point of interconnection. U S WEST argues for a requirement that AT&T's interconnection points for exchange of local traffic be within U S WEST's local calling area. U S WEST expressed a concern that if AT&T can choose a single IP per LATA, U S WEST may be required to backhaul traffic all over the state to deliver a local call.

AT&T claims that U S WEST is trying to limit its discretion in selecting IPs in order to avoid potential capacity problems at U S WEST's tandem switches. AT&T states that it has agreed to engage in joint forecasting which should mitigate U S WEST's concerns about capacity problems.

Section 251(c)(2) of the 1996 Act requires ILECs to provide interconnection at any technically feasible point. AT&T may choose the IPs and U S WEST must interconnect at the requested IP if it is technically feasible. The Act does not provide for exceptions based on cost or efficiency. The Commission adopts AT&T's position as U S WEST's position on this issue is contrary to the Act.

e. Issue 4 - Two-way Trunking (Resolved by the parties).

f. Issue 5 - Interconnection with U S WEST's End Offices (Reciprocal Compensation).

The remaining unresolved matter associated with this issue appears to be whether AT&T's switch should be treated for compensation purposes as an end office or a tandem switch. U S WEST requests that the Commission decide that for the purpose of reciprocal compensation, AT&T's switch be treated as an end office. AT&T's contract requires compensation at the tandem switch rate.

We decline to decide this issue as the record lacks information about AT&T's switch with which to determine whether compensation should be at the end office rate or the tandem switch rate. Section 2.4.2 of Attachment 3 to AT&T's contract and any related provisions should be deleted. Section 5.4.1.4 of U S WEST's proposed contract is also rejected.

g. <u>Issue 7 and Issue 8 - Distance Limitations for Mid-Span Meets and Meet Points for Access to Unbundled Network Elements.</u>

There is no arbitration dispute with regard to Matrix Issue 7, distance limitations for mid-span meets. U S WEST's contract includes a provision for mid-span meet points at § 6.2. The contract language does not include limits on the length of U S WEST provided facilities to a meet point, U S WEST asserts that a reasonable limit is one-half the distance between the parties' switches. The Act at § 251(c)(2) imposes an interconnection duty at any technically feasible point and does not limit that duty to a specific method of interconnection or access to unbundled elements. <u>FCC Interconnection Order</u>, at ¶ 549. The Commission adopts the contract language from § 6.2 of U S WEST's proposed agreement, which includes no limits on the distance to a meet point..

The dispute between the parties on Matrix Issue 8 is the language in AT&T's Attachment 3, Section 1.2.2. U S WEST claims that this section of AT&T's contract ignores the FCC requirement that AT&T bear the full cost of a meet point used for access to unbundled network elements. Although AT&T states that it supports the FCC order in regard to this requirement, its contract provides for joint provisioning with each party paying a "proportionate share of financial and other responsibilities for that facility based on the reasonably negotiated Meet Point percentage."

Paragraph 553 of the FCC Interconnection Order provides in pertinent part:

> In a meet point arrangement each party pays its portion of the costs to build out the facilities to the meet point. ... [S]uch an arrangement only makes sense for interconnection pursuant to section 251(c)(2) but not for unbundled access under section 251(c)(3)....

> In an access arrangement pursuant to section 251(c)(3), ... the interconnection point will be a part of the new entrant's network and will be used to carry traffic from one element in the new entrant's network to another. We conclude that in a section 251(c)(3) access situation, the new entrant should pay all of the economic costs of a meet point arrangement. (Emphasis supplied.)

We find AT&T's contract provision inconsistent with the FCC Order. The Commission concludes that the agreement should be revised to include language expressly stating that for a meet point constructed to access unbundled elements, AT&T shall pay all costs of the meet point arrangement.

h. Issue 10 - Collocation Premises.

U S WEST is resisting AT&T's proposal that it be allowed to collocate equipment at locations other than end office and tandem switching locations on a general availability basis. U S WEST believes that AT&T should submit a request using the BFR process if it wants to collocate equipment in places other than end office or tandem locations. U S WEST asserts that it has concerns about "network reliability, security and space limitations in splicing vaults, controlled environmental vaults, feeder distribution interfaces, etc."

The FCC Order requires U S WEST to permit collocation at all places which are considered "premises" as defined therein. The FCC interpreted the term "premises" as a broad inclusion of "LEC central offices, serving wire centers and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities ... [and] any structures that house LEC network facilities on public rights-of-way, such as vaults containing loop concentrators or similar structures." FCC Interconnection Order, at ¶ 573.

U S WEST has challenged this FCC ruling in its appeal in the 8th Circuit of the FCC Order and urges the Commission to ignore the FCC's conclusion. As previously explained in this Order, we are implementing the FCC Interconnection Order for the content which has not been stayed by the 8th Circuit. We adopt AT&T's proposed definition of allowable collocation premises as it is consistent with the FCC Order and is not affected by the stay in the 8th Circuit.

i. Issue 10a - Collocation General Terms.

U S WEST wishes to limit entry into collocated space to fiber optic cable. AT&T wants no restrictions placed on the types of cable used for entry into collocated space.

The Commission declines to place restrictions on the type of cable which AT&T may use for entry into collocated space. U S WEST's network is comprised of many vintages of equipment and the best cable for interconnection may depend on the equipment to which it is being collocated.

AT&T also wants to have the ability to store spare equipment on U S WEST premises for maintenance and outages. U S WEST would have AT&T use its collocated space to store spare equipment.

The Commission declines to order U S WEST to provide storage space to AT&T without compensation. To the extent that AT&T wants to store spare equipment on U S WEST premises, it should use its collocated space or negotiate another arrangement with U S WEST for additional storage space.

AT&T further requested the Commission to authorize compensation for construction and turnover delays caused by U S WEST. AT&T's request for liquidated damages is addressed above.

j. Issue 11 - Interconnection with Other Collocators (resolved by the parties).

3. Standard Ordering Processes.

a. Issue 12 - Ordering Procedure for Collocation.

The remaining dispute on this issue is the standard ordering procedure AT&T must use to collocate equipment. Both parties argue that the Commission should adopt their respective contract ordering procedure for collocation. AT&T argues that the BFR process is not appropriate for many requests due to the large number of potential locations where it may seek interconnection or collocation. At a minimum, AT&T requests that U S WEST apply the results of any one BFR process to similar requests.

AT&T claims that its contract, at Attachment 5, § 4, provides a standard ordering procedure for obtaining collocation. However, we have been unable to find a reference to a standard ordering procedure for collocation in this attachment to AT&T's contract. This entire section of the contract relates to the ordering procedures for obtaining "elements either individually or in any combination." It does not appear to apply to ordering procedures for collocation.

U S WEST states that its contract Section 7 deals generally with the issue of collocation and the procedure to be followed for obtaining collocation. This section of U S WEST's contract contains provisions for obtaining collocation and establishes clear procedures to be followed when ordering collocation. We adopt U S WEST's contract provisions subject to appropriate revisions which recognize the expanded definition of collocation premises adopted by the Commission in this Order.

b. Issue 13 - Collocation Space.

This issue involves allocation of U S WEST's space to collocators. The parties agree that U S WEST must make space available to collocators on a first-come, first-served basis. U S WEST points out that AT&T's contract provision at Attachment 4, § 2.2.1 does not include a first-come, first-served provision. We agree with U S WEST that this must be included in the agreement. They further agree that if a dispute arises with regard to the availability of space for collocation, the dispute resolution process should be used.

B. Extent of Unbundling (Issues 14-26, 68).

Section 251(c)(3) of the 1996 Act requires U S WEST and other ILECs to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point at just, reasonable, and nondiscriminatory rates, terms, and conditions. Requesting carriers must be allowed to combine these unbundled network elements in order to provide telecommunications services. 47 U.S.C. § 251(c)(3)

A network element is defined in the Act as "a facility or equipment used in the provision of telecommunications service." 47 U.S.C. § 153(a)(45). Section 153(a)(45) provides that "the term also includes the features, functions and capabilities associated with such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."

The FCC Interconnection Order established the following minimum set of network elements ILECs must provide: (1) local loop, (2) network interface device, (3) local and tandem switching capabilities (including all vertical switching features provided by such switches), (4) interoffice transmission facilities, (5) signaling networks, (6) call-related databases and service management systems, (7) operations support systems functions, (8) and operator services and directory assistance. *See* 47 C.F.R. § 51.319. The FCC further determined that states may require ILECs to provide additional network elements on an unbundled basis. For example, the FCC stated that the technical feasibility of subloop unbundling is best addressed at the state level on a case-by-case basis. FCC Interconnection Order, at ¶ 391.

1. Issue No. 14 - General Extent of Unbundling - There appears to be no substantial disagreement on this issue. Both parties agree, at least in principle, that U S WEST must provide unbundled network elements on a standardized basis consistent with the FCC's rules. U S WEST also agrees to consider the unbundling of additional network elements on a bona fide request (BFR) basis.

Although the parties have agreed in principle, they have not reached complete agreement on whether the agreed upon language is to be included in AT&T's contract or whether it is stand-alone language. AT&T states that its agreement on the contract language depends upon the inclusion of that language in AT&T's contract. We conclude the contract language should be consistent with the FCC's rules. With the Commission's adoption of the AT&T contract, the issue is resolved.

2. Issue 15 and Issue 68 - Local Loop: Definition and Charge for Loop Conditioning.

a. Definition - AT&T argues that U S WEST's proposed definition of the local loop element is incomplete according to the FCC Interconnection Order. U S WEST proposes to include basic two-wire and four-wire loops that connect the main distribution frame at its central office to the Network Interface Device (NID).

The FCC defines the local loop as "a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the [NID] at the customer premises." FCC Interconnection Order, at ¶ 380. As examples, the FCC includes two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to permit the transmission of the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals.

This is another issue not affected by the 8th Circuit's stay of the FCC Order. The Commission concludes that the definition in the contract should be consistent with the FCC definition.

b. Charge for Loop Conditioning - U S WEST witness Cheryl Gillespie testified that U S WEST is willing to "unload" or "condition" loops if requested by AT&T and if AT&T is willing to compensate U S WEST for its costs. U S WEST proposed a nonrecurring charge of $577.48 for conditioning loops. Ms. Gillespie stated that the cost can be high because a technician must visit each site on the loop that contains a load coil or bridge tap and the average loop involves three site visits. AT&T's position is that nonrecurring charges are included in the Hatfield model and would be recovered in the price of unbundled network elements. However, this charge is not included in AT&T's model because the technology used in it would not include loaded loops as they are not efficient engineering.

The FCC discussion of conditioning loops indicates that it did not assume that nonrecurring costs associated with loop conditioning were included in the TELRIC models for pricing unbundled network elements. In noting that modification of ILEC facilities, including loop conditioning, is encompassed within the duty imposed by § 251(c)(3), the FCC stated that the requesting carrier would have to compensate the ILEC for conditioning. *See* FCC Interconnection Order, at ¶ 382.

Although we follow the FCC Order in requiring AT&T to compensate U S WEST for conditioning, we find the proposed charge of $577.48 excessive. AT&T recommended a charge from U S WEST's end user tariff for ISDN of $50.00. Ms. Gillespie testified that this is not the correct rate for comparison and that the nonrecurring charge to a retail customer for loop conditioning is $110.00. (U S WEST Exhibit 27)

Because AT&T's model does not include recovery of nonrecurring loop conditioning costs, the Commission finds that some other provision for recovery is appropriate. We adopt the $110.00 nonrecurring charge for conditioning until the Commission is able to complete a thorough review of U S WEST's proposed nonrecurring cost model.

3. Issue 16 - Subloop Unbundling.

AT&T has requested that the Commission require U S WEST to unbundle the subscriber loop into the subelements of loop feeder, loop distribution and loop concentrator/multiplexer. The dispute between the parties on this issue is no longer whether U S WEST will unbundle the loop to the subloop elements, but what is meant by the BFR process. U S WEST has agreed that it will unbundle to the subloop elements where technically feasible on a "bona fide request" (BFR) basis.

AT&T and U S WEST have agreed to use the BFR process for subloop unbundling requests, but disagree on what must be determined as a part of the BFR process. U S WEST proposes that AT&T use the BFR process to request subloop unbundling on a specific, locational, case by case basis. However, AT&T appears to take the position that the BFR should be a single filing process that results in U S WEST being required to offer subloop element service globally on its system.

Commission Decision. Subloop unbundling is required by the 1996 Act if technically feasible. 47 U.S.C. § 251(c)(3). The Commission agrees with U S WEST that the BFR process should not be a single filing. However, this finding does not mean the BFR process will or should be necessary for every request, or that U S WEST should take the maximum amount of time prescribed in the BFR process for every request. The Commission finds that once U S WEST determines the technical feasibility and cost of subloop unbundling of particular configurations in response to BFRs, the process of providing this information on similar configurations in other locations should be considerably more streamlined. U S WEST must not abuse the BFR process to cause unnecessary delays in providing the requested information to AT&T.

4. Issue 17 - NID Connections.

This issue appeared to be resolved at the time of the hearing. To the extent there is still a dispute, we provide the following resolution. We find that U S WEST should allow AT&T to connect directly to its network interface device (NID), where spare capacity is available. In instances where spare capacity does not exist, AT&T should adhere to the FCC rules regarding a NID-to-NID arrangement.

5. Issue 18 - Vertical Features.

U S WEST and AT&T disagree on whether vertical features such as custom calling features are part of the local switching element. U S WEST proposes that the Commission disregard the FCC determination that vertical features are part of the switching element and find that they are retail services that should be available to competitors on a resale basis only. According to U S WEST, vertical features provide significant contribution which will be at risk if included as part of the switching element. AT&T argues that the Act and the FCC order require vertical features that are part of the local switching element to be unbundled and thus the definition of local switching in the AT&T contract should be adopted.

AT&T cites ¶¶ 412 and 413 of the FCC's Interconnection Order to support its position. Again, the 1996 Act defines network element as "a facility or equipment used in the provision of a telecommunications service and the features, functions and capabilities that are provided by means of such facility or equipment." In determining that the vertical switching features should not be classified as retail services and available only for resale, the FCC stated, "There is little question that vertical switching features which are provided through the operation of hardware and software comprise the facility that is the switch, and thus are features and functions of the switch." FCC Interconnection Order, at ¶¶ 412-13.

Commission Decision. The Commission will not adopt a position in this arbitration that is inconsistent with the regulations established by the FCC. The FCC concluded that the local switching element includes all features, functions, and capabilities of the switch. These features, functions and capabilities include but are not limited to custom calling, CLASS, Centrex and any technically feasible customized routing functions provided by the switch. 47 C.F.R. § 51.319(c)(1)(i)(C)(*2*). Consistent with the FCC rule, which is not stayed, the Commission finds that the local switching element includes the vertical features, functions, and capabilities of the switch which AT&T may purchase as unbundled elements.

6. **Issue 19, Issue 20, and Issue 21 - Advanced Intelligent Network (AIN) Triggers, Digital Cross-connect, and Packet Switching**.

The parties have substantially resolved these issues and the AT&T contract should be revised accordingly. Apparently complete resolution of these issues, as with many others, is dependent on the particular contract language to be included. We conclude that the record is insufficient with which to determine which contract terms are most appropriate.

7. **Issue 22 - Dark Fiber**.

Dark fiber is fiber optic cable that has been placed in the ground or aerial and which is unlit until electronics are connected to each end to make it operational. U S WEST’s unused and in-place fiber in Montana is part of interoffice transport facilities, not loop plant.

U S WEST contends that unbundling of dark fiber is outside the scope of the 1996 Act because it is not a network element and AT&T’s request for access to U S WEST’s dark fiber "essentially boils down to a request for exclusive use of U S WEST’s spare network capacity." U S WEST claims that it is not a network element as that term is defined in § 3(45) of the 1996 Act because it is not a facility or equipment "used" to provide telecommunications service. U S WEST witness Mr. Barry Orrel distinguished dark fiber from unused copper by saying the unused fiber is part of U S WEST’s inventory and used in network planning. U S WEST’s primary argument against unbundling dark fiber is that the FCC did not require it.

AT&T argues that unbundling of dark fiber would produce additional revenue for U S WEST’s shareholders and nothing in the FCC Interconnection Order precludes state commissions from ordering U S WEST to unbundle its fiber. Unbundling dark fiber will enable AT&T and other competitors to use the full bandwidth available from fiber and to provide that bandwidth to end users in the most economical way possible. According to AT&T, unbundling dark fiber "will benefit AT&T and AT&T's customers, and it will benefit U S WEST and its customers by creating a revenue source U S WEST now chooses to forego." AT&T stated that it will be able to provide full bandwidth to end users in the most economical manner possible, implying that failure to provide access to fiber would impair the ability of AT&T to provide the services it seeks to offer.

The FCC declined to address the unbundling of incumbent LECs' dark fiber, stating that it lacked a sufficient record on which to decide the issue and that it would continue to review and revise FCC rules in this area as necessary. FCC Interconnection Order, ¶ 450. Section 251(c)(3) requires the incumbent LEC to provide nondiscriminatory access to network elements at any technically feasible point. Section 251(d)(2) provides that in determining what network elements should be made available for purposes of subsection (c)(3), the FCC shall consider, at a minimum, whether access to proprietary network elements is necessary and whether the failure to provide access to network elements would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer.

Commission Decision. The Commission concludes that U S WEST must provide access to its dark fiber as an unbundled network element. Requiring access to this spare capacity is analogous to requiring access to U S WEST's capacity on poles, conduits or rights of way in that the capacity is not used but is available. Dark fiber is an unused transmission facility that could be used in a number of ways by AT&T to facilitate the provision of telecommunications services thereby enhancing network utilization. We therefore conclude that dark fiber which is installed aerially or in the ground is a network element, just as copper installed is a network element. Both are used to provision telecommunications service.

The FCC Interconnection Order at ¶¶ 283 and 285 presumes unbundling of network elements unless the incumbent can prove the element is proprietary, or that access would decrease network quality or increase the financial or administrative cost of the service the CLEC seeks to offer compared with providing that service over other unbundled network elements the ILEC offers. The record does not support a conclusion that a request to unbundle dark fiber should be precluded under these standards or the FCC's regulations.

Dark fiber that is in place is not merely inventory as U S WEST contends and is indistinguishable from copper or other transmission facilities. Using U S WEST's rationale, any element that has been installed but is currently unused or which must be used in conjunction with other elements to provide telecommunications service, would not qualify as a network element. Dark fiber is a facility that provides transmission functionality when used in conjunction with other network facilities and functions in the same manner as copper loop facilities which also require added electronics to transmit telecommunications.

The Commission finds that AT&T must use the BFR process to request dark fiber. This process will provide an orderly and defined method for U S WEST to determine the technical feasibility and cost of providing this network element. If U S WEST leases dark fiber to AT&T and subsequently determines it will need that capacity for its own needs, U S WEST must establish that reclaiming the fiber is necessary and provide 12-months notice to AT&T that it intends to reclaim the fiber.

8. Issue 23 and Issue 24 - Service Control Point (SCP) Unbundling and Interconnection With Other Networks.

The parties appear to agree on these issues, but have not stipulated to contract language. Although there may be contested sections of the proposed contracts, we are unaware of the specific disagreements. Therefore, we decline to decide this issue.

9. Issue 25 - PLATFORM (unbundling and recombination of network elements).

a. Unbundling and recombination - U S WEST has requested that AT&T be prohibited from purchasing unbundled network elements for purposes of recombining them into a finished service that replicates a U S WEST retail service. U S WEST contends that recombination will create an unfair rate arbitrage opportunity resulting in significant revenues losses for U S WEST. U S WEST explains that the revenue loss will occur because CLECs will be able to obtain the equivalent of certain wholesale services at prices much lower than wholesale prices. As an example, AT&T could purchase the unbundled network elements necessary to replicate local service, then "resell" the service to a business customer. With this illustration, the price AT&T pays for the elements would be much less than the wholesale price for 1FB service. In addition, CLECs will avoid paying access charges that would apply if they purchase U S WEST's service at wholesale rates and resell it.

According to U S WEST, Congress intended to limit the purchase of unbundled network elements to CLECs which provide at least one of the primary elements necessary to furnish the finished service to an end user. U S WEST explains that the Act provides two methods for CLECs to obtain service from ILECs--resale and unbundling--and two associated standards for determining how that service should be priced-- retail less avoided cost and cost based. U S WEST believes that it would have been unnecessary for Congress to implement two methods of costing and service provision if Congress intended entire services to be purchased through unbundling because this result would have negated a need for the resale provisions.

In contrast, AT&T argues that both the Act and the FCC Order require U S WEST to provide unbundled network elements to any requesting CLEC and to allow the CLEC to recombine the unbundled network elements to provide a finished service to an end user. AT&T also argues that combinations of network elements and service-resale are not equivalent entry options because each is associated with unique costs, revenues, opportunities and business risk. Finally, AT&T cites full price competition, product differentiation, service innovation and consumer protection from U S WEST strategically limiting its service offerings as reasons to allow full rebundling of network elements.

The 1996 Act at § 251(c)(3) provides in pertinent part:

> (3) UNBUNDLED ACCESS ... An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

The FCC Interconnection Order supports AT&T's position as well.

Commission Decision. The Commission denies U S WEST's request for rebundling prohibitions. Such prohibitions would be contrary to both the Act and the FCC's Interconnection Order. The Commission also disagrees with U S WEST's conclusion regarding

Congress's intent for rebundling network elements. The 1996 Act clearly requires ILECs to provide unbundled network elements in a manner that allows requesting carriers to combine the elements to provide telecommunications services. The Act also includes language on the pricing of network elements, which must be based on cost, non-discriminatory, and may include a profit.

We believe Congress intended to allow CLECs the opportunity to use any ILEC network elements that can be unbundled (i.e., technically feasible to unbundle) in any manner they wish. This will allow CLECs to utilize the ILECs' networks in creative and innovative ways that are not being used by the ILECs. The Act contains no language that only allows "facilities-based" carriers to use unbundled network elements, nor does it contain any language that prohibits CLECs from recombining the elements to provide a service that is offered by an ILEC at wholesale. CLECs will be able to exploit the economies of scale and scope that are an integral part of the public switched network, and which have been paid for by ratepayers. It is fitting that ratepayers also should ultimately be the beneficiaries of this unbundling.

b. **Rebundling Charge** - U S WEST suggests that if the Commission declines to impose the rebundling prohibition, it should at least consider imposing a "rebundling charge" when a CLEC purchases both the unbundled loop and unbundled switching elements and combines them in order to provide basic exchange service. In U S WEST's view, this charge would reduce the ability of CLECs to arbitrage between unbundled element and resale rates. The MCC's witness Allen Buckalew also advocated a similar pricing provision if the Commission allows unrestricted purchase and aggregation of unbundled network elements. Mr. Buckalew's proposal would price unbundled network elements at wholesale when a CLEC purchases them to provide a service identical to a U S WEST wholesale service.

The Commission finds that Congress did not intend for ILECs to merely give these elements to CLECs. On the contrary, the 1996 Act specifically states that the charge for the elements should be based on the cost[7] of providing the elements, and may include a reasonable

[7] Congress's intentions for the definition of the term "cost" is the still being debated.

profit. If CLECs can find ways to utilize the elements to provide services customers want, and at prices customers are willing to pay, and if the ILECs are able to earn a "reasonable profit" from providing those elements to the CLECs we do not see where any party is harmed. In fact, we believe such unbundling can play a significant role in achieving Congress's goals of promoting competition, reducing regulation, securing lower prices and higher quality services, and encouraging the rapid deployment of new telecommunications technologies.

We recognize, however, that due to the short time frame for arbitrating this case, we were not able to conduct a thorough review of each of the studies used by the parties to support their pricing proposals for the unbundled network elements. We are establishing interim rates using what we believe is the best information available to us in this proceeding, and will establish permanent rates in a separate generic U S WEST costing and pricing docket which will allow the parties to focus on costing and pricing issues and related policy matters.

Because we have not conducted a thorough investigation to establish the prices U S WEST may charge for unbundled network elements, we are concerned about allowing AT&T to purchase these elements to provide a service that is substantially identical to a retail service provided by U S WEST. Therefore, until we establish permanent rates that we believe accurately represent the costs U S WEST incurs in providing network elements, plus a reasonable profit, the Commission finds that if AT&T provides a service that replicates a retail service provided by U S WEST, and if it provides that service solely by combining U S WEST's network elements without providing any of the elements itself, AT&T's compensation to U S WEST shall be equal to U S WEST's wholesale rate for that service. For purposes of this order, this means that AT&T is not using its own loop or switching functionality to produce the service.[8]

The Commission concludes that the rebundling charge is equal to the difference between U S WEST's applicable wholesale price for the particular service being provided and the sum of U S WEST's prices for the elements being used to provide the service. This charge should be added to the charges for the unbundled network elements. We also find that all other terms and conditions associated with purchasing the service at wholesale shall apply, such as the application of access and end user charges and the imposition of joint marketing restrictions.

10. Issue 26 - Customized Routing.

Testimony at the hearing indicated that there was substantial agreement on this issue. To the extent there is still disagreement, we recognize the FCC Order requires ILECs to provide customized routing as part of the functionality of the local switching element only to those switches that are capable of performing customized routing. U S WEST must prove to the Commission that customized routing in a particular switch is not technically feasible. FCC Interconnection Order, at ¶ 418. We are unaware of any remaining disagreement on this issue.

C. Resale (Issues 27-36, 54).

In addition to being able to purchase and combine network elements, a new entrant may provide some or all services using its own facilities or it may resell the incumbent's services to

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[8] If AT&T purchases U S WEST's elements to provide a service that replicates a U S WEST retail service, and only provides operator services/directory assistance, AT&T shall still pay the wholesale price associated with U S WEST's retail service.

end users. The resale of services is a means of introducing competition prior to facilities-based competition. The parties have identified several issues concerning resale.

1. Issue 27 - Services to be Made Available for Resale.

U S WEST has agreed to make all retail services available for resale with the exception of enhanced services, deregulated services, and promotions of fewer than 90 days. AT&T has argued that U S WEST must also offer, at a discount, other services such as non-tariffed and deregulated services. U S WEST also contends that it is not required by the 1996 Act to offer enhanced services for resale because enhanced services constitute information services, and therefore fall outside the requirement that it make its "telecommunications services" available for resale. MCC witness, Mr. Buckalew, testified that U S WEST should be required to make all retail services it provides to its customers available for resale, including any discounted or "below-cost" services.

Section 251(c)(4) of the 1996 Act describes the ILEC's duties related to resale. It states that ILECs have the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers," and the further duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service." 47 U.S.C. § 251(c)(4). According to the Federal Act, "telecommunications services" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public. 47 U.S.C. § 153(a)(46). The federal Act defines "telecommunications" as the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. 47 U.S.C. § 153(a)(43).

Commission Decision. The Commission concludes that the 1996 Act clearly requires U S WEST to offer for resale all services it provides to end user customers at retail. The Act makes no distinction between regulated and unregulated, no distinction between tariffed and detariffed services, no distinction between basic and enhanced services, and no exception for telecommunications services which are "information services." As an example, this requires U S

WEST to offer VoiceMail, an enhanced service, for resale simply because this is a telecommunications service offered to end users at retail rates. The plain language of the Act says <u>any</u> service offered at retail to subscribers who are not telecommunications carriers.

The Commission disagrees with U S WEST's assertion that enhanced services are not "telecommunications services" which must be offered for resale. Although some of U S WEST's services may properly be classified as "information services," information services and telecommunications services are not mutually exclusive.

2. <u>Issue 27a - Features and Functions</u>.

The primary disagreement on this issue appears to be that AT&T wants the Commission to require U S WEST to provide a list of available features in each of U S WEST's Montana central offices within 10 days of the effective date of the interconnection agreement between AT&T and U S WEST. U S WEST claims this requirement is unreasonable and suggests instead that AT&T consult with U S WEST's retail tariffs to determine which retail services and features are available for resale.

<u>Commission Decision</u>. The Commission disagrees with U S WEST's position that AT&T can look to U S WEST's tariffs to determine which retail services and features are available for resale. In various places, U S WEST's Exchange and Network Services Tariff contains language similar to the following provisions :

> Custom Calling Services are furnished only in CO areas where adequate and suitable facilities are available.... Section 5.4.3(B)(1).
>
> Services offered as part of Custom Solutions are subject to availability of existing facilities. Section 5.4.14(B)(3).
>
> TDRS [Traffic Data Report Service] is available where central office facilities permit. Section 10.10.4(C)(1)

U S WEST's tariff does not provide the necessary information to allow AT&T to determine if a particular service is available in a particular central office. AT&T's position is also unreasonable. The Commission concludes that, if AT&T wishes to resell a particular service or list of services, it should make a formal request to U S WEST to identify all central offices in which the services included in the request are available. U S WEST must respond to such requests pursuant to the terms in the BFR stipulation between the parties.

3. <u>Issue 28 - Time Frame for Distinguishing Promotions from Retail Offerings</u>.

The parties identified as an unresolved issue that the Commission decide whether the 90-day time frame for distinguishing between a promotion and a retail offering specified in the FCC Interconnection Order is proper, with U S WEST advocating for an extended time beyond the 90 days and AT&T recommending adherence to the FCC-prescribed 90-day time line. According to the parties' post-hearing briefs, however, AT&T and U S WEST apparently now agree that U S WEST should be required to offer any promotion lasting more than 90 days for resale. (AT&T Post-Arbitration Brief, Page 17 and U S WEST Closing Brief, Page 41.)

The FCC's Interconnection Order at ¶ 950 establishes a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. and that those of greater than 90 days in duration must be offered at wholesale rates pursuant to § 251(c)(4)(A) of the Act. U S WEST's matrix position states that it will comply with the 90-day time frame for its promotions unless the Commission rules otherwise. Accordingly, the Commission declines to make any findings on this issue.

4. <u>Issue 29 - Resale Restrictions</u>.

The FCC concluded that resale restrictions are presumptively unreasonable and in violation of § 251(c)(4) of the 1996 Act, stating, "the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position." <u>FCC Interconnection Order</u>, ¶ 939. The FCC further stated that this presumption is consistent with the procompetitive goals of the 1996 Act.

Section 251(c)(4)(B) of the 1996 Act provides that state commissions may prohibit resale of services available only to a category of subscribers to a different category of subscribers. <u>FCC Interconnection Order</u>, at ¶ 958. There does not seem to be any substantial disagreement between the parties on this issue and they appear to agree that the resale of residential services should be restricted to residential customers. However, to the extent it is still an open issue, the Commission concludes that U S WEST's services may only be resold to the same class of customers that are eligible to purchase the retail service from U S WEST. For example, any resale of U S WEST's Low Income Telephone Assistance Program and Link-up America services should be restricted to eligible customers.

5. Issue 30 and Issue 54 - Branding.

Branding is the identification of a carrier's brand name or other identifying information. AT&T considers that branding of services provided by U S WEST to AT&T is a critical component of its plans for providing local service. Specifically, AT&T requests the Commission order U S WEST to brand services and network elements that AT&T will resell exclusively as AT&T's services, and not brand them as U S WEST services. Additionally, AT&T proposes that when U S WEST personnel must interface directly with AT&T customers in person, by telephone, or in writing, they must identify themselves as representing AT&T and must not identify themselves as representing U S WEST. AT&T also proposes that all forms, business cards or other business materials furnished by U S WEST to AT&T customers be subject to AT&T's prior review and approval, and bear no corporate name, logo, trademark or trade name other than AT&T's or such other brand as AT&T determines. AT&T would further require U S WEST to provide, for its review and approval, the methods, procedures, training and approaches to be used by U S WEST to ensure that U S WEST meets AT&T's branding requirements. (*See* AT&T's proposed Interconnection Agreement at § 15.)

U S WEST agrees to "rebrand" or "unbrand" operator services and directory assistance where technically feasible. However, AT&T objects to U S WEST's condition that it pay branding and unbranding costs.

The FCC rule on branding of operator services and directory assistance provides, "Where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller unbranding or rebranding requests shall constitute a restriction on resale." 47 C.F.R. § 51.613(c). The rule further permits an ILEC to impose such a restriction "only if it proves to the state commission that the restriction is reasonable and nondiscriminatory, such as by proving to a state commission that the incumbent LEC lacks the capability to comply with unbranding or rebranding requests." Id., at § 51.613(c)(1).

The FCC requires U S WEST to brand operator services and directory assistance at this time, but it did not make any determinations on the appropriate prices for this service, or on how the ILEC can recover its costs for providing such services because it had no record on which to base such determinations. FCC Interconnection Order, at ¶ 971. The same is true in this proceeding. U S WEST's contract states that prices for branding and unbranding will be determined by the "Network Interconnection and Unbundled Request Process."

We will not adopt U S WEST's method for determining branding prices for operator services and directory assistance on a permanent basis; however, as an interim measure, we adopt U S WEST's proposal and will require no subsequent true-up. These prices will be established in the generic costing and pricing docket, if requested.

The FCC's Interconnection Order does not specifically require branding of repair and maintenance services provided by an ILEC on behalf of a CLEC. We find AT&T's proposals for such branding excessive, but require U S WEST to specifically inform a customer that the contact is on behalf of AT&T when making any form of contact with an AT&T resale customer. Further, no mention of U S WEST's services or unflattering remarks about AT&T or local service competition shall be made by a U S WEST representative to AT&T's customers when making such contacts.

6. Issue 31 - Wholesale Pricing--Factors to Consider.

Section 252(d)(3) establishes the standard that state commissions must use to determine wholesale rates during arbitrations. Specifically, §252(d)(3) requires wholesale rates to be determined "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." The FCC described the wholesale rate design process as consisting of two steps: (1) identify the marketing, billing, collection and other costs that will be avoided by ILECs when they provide services at wholesale, and (2) calculate the portion of the retail prices for those services that is attributable to the avoided costs. FCC Interconnection Order, at ¶ 908.

The portion of the retail prices attributable to avoided costs is commonly referred to as the wholesale discount. This discount is calculated by multiplying the discount rate--determined by an avoided cost model--times the retail price. The formula used to derive the wholesale price of a service is:

Wholesale Price = Retail Price - (Wholesale Discount Rate x Retail Price).

a. **Factors to consider in wholesale pricing**. The parties disagree on the avoided cost model which should be used to calculate the wholesale discount rate. AT&T has presented one model and U S WEST has presented two models. MCC's witness also offered recommendations on determining U S WEST's wholesale prices. The models and recommendations are briefly described below.

i. **AT&T's Model**. AT&T proposed its "Simplified Avoided Cost Study" for the Commission to use in determining the wholesale discount. AT&T's study uses cost data for Montana from U S WEST's ARMIS 43-03 report to the FCC. AT&T has designated the various USOA[9] cost accounts in the ARMIS data as either direct or indirect costs. Next, AT&T identified the direct and indirect cost accounts that will either be partially or entirely avoided by U S WEST in its wholesale operations. AT&T made assumptions about the percentage of avoidable costs in the direct cost accounts, and used the ratio of avoided direct costs to total direct costs to determine the percentage of the indirect costs that will be avoided.

Direct avoided costs include categories such as product management, sales, product advertising, and operations testing. After making an adjustment for access expenses which resale does not affect, AT&T estimated that U S WEST would avoid 22.9 percent of its total direct expenses.[10] As indirect avoided expenses, AT&T includes categories such as general support

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[9] Uniform System of Accounts

[10] Although AT&T's estimate is 22.9 percent, AT&T assumed U S WEST would avoid 100 percent of the costs in many specific USOA accounts.

expenses and corporate operations expenses. AT&T applied the 22.9 percent to the costs in these indirect accounts to derive the avoided indirect costs.

Finally, AT&T added the total avoided costs and made some adjustments to this total to account for access costs, taxes, and some other items, and then divided this amount by U S WEST’s total revenue for the services subject to resale ($36.616 million divided by $145.855 million) to derive its recommended wholesale discount rate of 27.18 percent to be used for determining the wholesale discount of each of U S WEST’s services subject to resale.

U S WEST’s witness Marti Gude criticized AT&T’s avoided cost model in her rebuttal testimony. In general, U S WEST claims that AT&T’s single composite percentage approach is unreasonable because it assumes U S WEST will avoid the same percentage of retail costs from each service sold at wholesale. More specific criticisms are explained below.

U S WEST claims AT&T’s model improperly mis-matches intrastate and interstate cost and revenue data on a selected basis. Although AT&T’s model uses "unseparated" data from the ARMIS 43-03 report, the revenue data used in the model includes only intrastate revenues while the cost data represents the costs of providing both interstate and intrastate services. Although AT&T adjusted its model to remedy this "mis-match" problem, U S WEST contends that the adjustment is flawed. Ms. Gude testified that when U S WEST "corrected" AT&T’s model to include all revenues, the recalculated wholesale discount is 18.79 percent.

U S WEST also claims that AT&T’s model overstates the marketing and billing costs that would be avoided, noting that the FCC assumed that only 90 percent of these costs would be avoided in deriving its avoided cost default range. U S WEST concedes that 90 percent is a more reasonable number than the 100 percent used by AT&T, but claims it still overstates the amount of these costs that will be avoided.

U S WEST also faults AT&T’s calculation because it does not include additional costs that U S WEST will incur as a wholesaler. U S WEST argues that these additional costs should be netted against avoided costs. They include product management, order processing and other non-recurring customer service costs, uncollectibles and billing expenses.

Other deficiencies identified by U S WEST are AT&T's inclusion of operator services/directory assistance accounts in its model and its failure to make an adjustment for "interarea rent compensation" to reflects payments made by U S WEST's Montana operations to other states for the use of corporate facilities located in those other states.

Finally, U S WEST disputes AT&T's use of results from a Bell Atlantic study to determine portions of costs attributable to providing access service that are not avoidable or discountable. U S WEST believes AT&T's model significantly overstates these costs.

ii. U S WEST's Avoided Cost Models. U S WEST presented two cost studies for calculating the wholesale discount--an embedded avoided cost study and a forward-looking avoided cost study. U S WEST requests that the Commission approve the discount rates resulting from its forward-looking study. This study uses a "bottom-up" approach to determine the wholesale discount; i.e., it provides estimated costs of retail activities then subtracts avoided costs.

U S WEST divides products subject to resale into product categories for purposes of determining avoided cost rates. According to U S WEST, this recognizes in the results the differences in the cost characteristics between the various categories.

AT&T argues that U S WEST's forward-looking avoided cost model should not be used to calculate the wholesale discount rate because the model is not consistent with defined guidelines, the input data cannot be verified, the logic is difficult to follow, and it contains mathematical errors.

U S WEST's embedded avoided cost study is similar to AT&T's avoided cost study. In calculating the wholesale discount, it uses (1) data from U S WEST's FCC ARMIS reports, (2) assumptions derived from U S WEST's TELRIC avoided cost study, and (3) information from U S WEST's embedded cost accounting allocation system. The ARMIS data used by U S WEST was taken from its 43-04 ARMIS report to the FCC, which separates the information in the ARMIS 43-03 report by splitting revenues, costs and investment between interstate and intrastate operations in compliance with FCC separations rules.

U S WEST reduced the costs and revenues taken from the ARMIS 43-04 report by amounts it has identified as being attributable to products and services that should not be subject to the resale requirement. U S WEST uses its embedded cost allocation system in this step. Next, U S WEST designates the cost accounts in the data as either direct or indirect costs. U S WEST identifies the direct costs that will either be partially or entirely avoided with the provision of wholesale service, using some assumptions from its "TELRIC Avoided Cost Study" to make these determinations. U S WEST then uses a ratio of avoided direct costs to total direct costs to determine the percentage of indirect costs that will be avoided. After completing these steps, U S WEST adds its total avoided costs and divides this amount by U S WEST’s total expenses to calculate a composite wholesale discount of 8.44 percent.

As in its forward-looking avoided cost study, U S WEST separates its products subject to resale into product categories and determines different discount rates for each category. The development of the category-specific discounts are accomplished through application of U S WEST’s Cost Allocation Accounting System/Cost Accounting Reporting System (CAAS/CARS) to the embedded cost information contained in the composite calculation. U S WEST proposes seven category-specific embedded discounts ranging from 2.7 percent to 23 percent.

AT&T challenges the validity of U S WEST’s embedded avoided cost study. According to AT&T, this study inappropriately excludes relevant costs, adds non-relevant revenues, and inappropriately allocates costs into product categories. AT&T emphasizes that this model uses internally developed, non-verifiable, proprietary accounting data, which cannot be examined and compared to any publicly verifiable data. According to AT&T, U S WEST has created another "black box" model.

iii. MCC’s Wholesale Discount Proposal. MCC recommends that none of the AT&T and U S WEST models be used without making modifications, and further recommends using AT&T’s model as it appears to be the most reasonable. MCC believes the discount rates proposed by U S WEST are unreasonably low. MCC suggests a reduction in AT&T’s 100 percent figure for certain entire categories of direct expenses, asserting that AT&T’s claim that some direct expenses are 100 percent avoidable is unreasonable. MCC further contends that AT&T's assumption that a portion of U S WEST's expenses associated with uncollectibles, depreciation/amortization, and general support functions will be avoided is also unreasonable.

According to MCC, when corrections are made for these shortcomings, AT&T's model yields an avoided cost discount rate of 17.9 percent. MCC recommends using this rate to determine all wholesale prices in this proceeding and suggests that a generic proceeding be initiated in which U S WEST could prepare and present avoided cost data on a service by service basis. MCC also states that some experience with these services is necessary to determine reasonable rates, and therefore, the Commission should give U S WEST one year from the conclusion of the generic proceeding to refile data.

b. **Arbitrated resolution**. The Commission rejects U S WEST's forward-looking model for calculating wholesale discount rates because the "bottom-up" approach is inconsistent with the 1996 Act's wholesale pricing standard. See 47 U.S.C. § 252(d)(3). At the hearing, U S WEST's witness on this model conceded that the model's results will be different from the results derived using the retail minus avoided cost standard, and that the model is inconsistent with the Act. Section 252(d)(3) provides that wholesale prices shall be determined "on the basis of retail rates charged to subscribers for the telecommunication service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." The Commission concludes that § 252(d)(3) requires a "top-down" approach to the calculation of a wholesale price for a particular service by starting with a service's actual retail price, not the cost, and subtracting the portions of the retail price which reflect avoided costs.

Conceptually, however, the Commission agrees with certain aspects of U S WEST's embedded avoided cost model. For example, it is unlikely that the same percentage of costs will be avoided from each service that is sold at wholesale, and U S WEST's model attempts to recognize this. However, in doing so, U S WEST primarily relies upon its CAAS accounting system to allocate various costs among the various services. AT&T lists a number of concerns about using CAAS data, such as U S WEST's reluctance to provide it with the CAAS reports until late in this proceeding and the use of what AT&T terms as unreasonable assumptions in the CAAS methodology. CAAS is not publicly available and the reasonableness of the methodology as applied to this proceeding has not been subject to verification by any party other than U S WEST.

Significant portions of U S WEST's model are unverifiable and may contain errors that could significantly impact its results. Therefore, the Commission finds that the model should not be used in this proceeding.

The Commission agrees with the MCC that both parties' models are flawed. We further agree that AT&T's model can be used if certain modifications are incorporated in the model to account for the significant criticisms of the model, and also to accommodate certain aspects of U S WEST's model that were either left out of or not adequately represented in AT&T's model.

The Commission concludes first that U S WEST's total "unseparated" revenues should be used in the model because the expenses in the model are generally unseparated. These inputs are readily available from U S WEST's ARMIS 43-03 report. Second, the adjustments made by AT&T to include U S WEST's capital costs and other state and local taxes do not appear to be as accurate as U S WEST's approach. AT&T's "return and taxes" and "access and miscellaneous costs" adjustments are deleted because these first two revisions make them unnecessary. Finally, we have made adjustments based on our disagreement with some of AT&T's assumptions regarding the percentage of costs U S WEST will avoid. When we incorporated these changes into AT&T's model, we arrived at an avoided cost discount rate of 18.1 percent.

7. Issue 32 - Packages Available for Resale.

U S WEST's current tariffs have a number of "packaged" service offerings as well as some service discounts (such as discounted optional toll calling services) that are available to end users. U S WEST argues that these services are already discounted and, therefore, an additional avoided cost discount should not be applied. (*See* Gillespie, direct, pp. 50-52.) U S WEST contends that the packaged rate is a wholesale rate and no further discount is required. AT&T argues that the Act requires all retail services be offered at a wholesale rate equal to the retail rate minus the cost avoided by the ILEC when it offers the service at wholesale rather than retail.

The FCC concluded that volume discounts are presumptively unreasonable, but that in calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling in large volumes. FCC Interconnection Order, at ¶ 953.

Commission Decision. While U S WEST's discounted prices for quantities and terms of services may reflect certain avoided marketing costs as it contends, U S WEST has not established that its avoided costs differ in such cases. The Commission concludes it is consistent with the 1996 Act and the FCC Order to require U S WEST to offer all its retail services, including retail service packages and discounted services, for resale at the wholesale rate.

8. Issue 33 - Resale of "below-cost" Services.

U S WEST (Bowman, direct p. 33) states that it should not be required to discount services for which the retail price is below cost. It argues that until it is able to rebalance rates, the Commission should approve wholesale rates equal to the retail rate for all services with retail rates that are below cost. U S WEST proposes to offer private line transport, services subject to volume discounts, discontinued services, and residence basic local service for resale, but without an avoided cost discount. AT&T witness Ms. Arleen Starr testified that, regardless of a service's price relative to its cost, offering a service for resale at wholesale prices based on avoided cost is a margin-neutral situation for U S WEST and does not cause U S WEST any financial harm. AT&T adds that U S WEST has not established that any of its services are priced below cost.

As discussed above, MCC's witness Mr. Buckalew testified that U S WEST should be required to make available for resale (at a wholesale discount), all its services it provides to its customers for retail sale, including any discounted or "below-cost" services. However, Mr. Buckalew argued that U S WEST should not be required to offer grandfathered services for resale because grandfathering of services is the only method by which the Commission can discontinue a service while allowing those subscribing to the service to keep it,.

The Commission agrees with AT&T that the 1996 Act does not limit resale at a discount to services whose retail prices are above cost. The Act specifically requires U S WEST to offer for resale any telecommunications service that it provides at retail to subscribers who are not telecommunications carriers. 47 U.S.C. § 251(b)(4)(A). If AT&T was not allowed to resell a particular grandfathered service to a current subscriber, that customer may be reluctant to switch its local service carrier from U S WEST to AT&T. Furthermore, the FCC's rule that requires resale of grandfathered services at wholesale rates is not subject to the stay order. Accordingly, U S WEST is required to offer grandfathered services for resale at wholesale rates, but AT&T may not resell such services to customers other than U S WEST's grandfathered customers of the services.

9. Issue 34 - Service Quality Credits (*see* Issues 63 and 64).

10. Issue 35 - Deposits.

AT&T argues that it should not have to pay a deposit before obtaining access to U S WEST's services for resale. It claims that this would raise barriers to entry and is thus contrary to the 1996 Act. U S WEST contends that it may require AT&T to make a suitable deposit to be held by U S WEST as a guarantee of the payment of charges. The deposit amount would be the estimated charges for the resold service which will accrue for a two-month period. U S WEST states that this is consistent with its deposit policy for U S WEST's retail customers.

Neither the 1996 Act nor the FCC Interconnection Order addresses payment of deposits. AT&T contends that U S WEST's comparison to deposits required of retail customers is misplaced. We agree. AT&T is not in the same situation as retail customers and it makes little sense to treat wholesale customers in the same manner. Moreover, as noted by AT&T, AT&T is a major customer of U S WEST's access service and has a long-standing credit history with U S WEST. According to AT&T, its credit history with U S WEST is excellent and there will not be a problem with timely payment to U S WEST.

Commission Decision. Although the record contains little from which to make a complete evaluation of this issue, no information has been presented which indicates AT&T should pay a deposit to guarantee payment of charges. A deposit is a reasonable means of preventing credit problems and, if reasonable, does not constitute a barrier to entry. Although a deposit may be justified for a new entrant with a history of poor credit in the payment of access or other charges, or a new entrant with no prior credit with U S WEST, deposits should be based on the individual circumstances of the carrier and determined on a case-by-case basis using industry standards.

11. Miscellaneous Resale Issues.

a. Issue - Customer Transfer Charge. U S WEST has proposed a "Customer Transfer Charge" (CTC) ranging from $11.16 to $22.20 that would apply whenever a U S WEST customer transfers local service to a reseller or a customer transfers from one reseller to another. The proposed charge includes the cost of rendering a final bill when a customer leaves U S WEST for a competitor and the cost of manually checking accounts that drop out of the automated system. Accounts would drop out of the system if the regulated portions of the account balances are "in arrears" and U S WEST would not permit the transfer until the customer paid the bill. The CTC, according to the testimony of Ms. Gillespie, includes costs of evaluating whether a customer will be permitted to transfer to a competitor, and is included in the cost to those customers who do transfer to a competitor.

AT&T asserts that a charge similar to U S WEST's charge to change a primary interexchange carrier (PIC charge) is appropriate. That charge is presently $5.00, although AT&T argued that it should be $0.45. According to AT&T, evidence from other jurisdictions suggests that even the $5.00 PIC charge is excessive and that a reasonable charge assuming a mechanized flow-through service order process is $0.45. AT&T also contends that although the FCC has authorized a reasonable charge, this Commission should not authorize a customer transfer charge until U S WEST has proven its costs as part of the Commission's examination of an appropriate TELRIC study.

Discussion: Ms. Gillespie did not know how many or what percentage of U S WEST accounts are in arrears, as U S WEST has used the term, and likely not to be transferred. However, a former customer of U S WEST who has no existing service due to an unpaid delinquent bill owed to U S WEST would be able to obtain service from a reseller based on the reseller's credit requirements. This proposed treatment of existing customers wishing to transfer providers raises serious questions concerning discriminatory treatment, anticompetitive behavior, and customer privacy. We do not consider U S WEST's proposed customer transfer practices as appropriate methods of reducing uncollectibles or of collecting construction charges. Nor do we approve the inclusion of charges for generating final statements to transferring customers. Therefore, the CTC as proposed by U S WEST includes improper costs and is excessive.

In contrast, AT&T's proposed charge of $0.45 which assumes a mechanized flow-through service order process appears too low. At least in the beginning of the parties' contract term, the service order process will not have reached the level contemplated by the parties through its anticipated "mediation gateway." Until the charges can appropriately be determined, we consider the present $5.00 PIC change charge to be a reasonable CTC for all accounts leaving U S WEST for a new resale competitor or changing from one CLEC to another.

b. Issue 36 - Construction and Additional Charges. U S WEST argues that if it must construct new facilities to service a reseller's customer, the cost of that construction should be paid in full by the reseller before the facilities are constructed. AT&T contends that U S WEST should not be permitted to impose construction charges or any other costs of compliance with the mandatory resale provisions of the 1996 Act that it does not similarly bill its own retail customers. According to AT&T witness Ms. Starr, that would be a violation of the Act and a barrier to entry. AT&T proposes that its recommended discount rate of 27.18 percent also be applied to the retail nonrecurring charge to determine a wholesale nonrecurring charge.

U S WEST explains that a reseller may request to serve a customer in areas where facilities are not available. U S WEST asserts that assessment of construction charges to the reseller is the only way it can assure the recovery of these costs, particularly with the advent of facilities-based competition.

The Commission will require resellers to pay up-front construction charges only if the charges would be assessed if U S WEST would be providing retail service to the end user customer or group of customers. However, the record is deficient regarding the appropriate wholesale discount rate to be applied to U S WEST's retail construction charges, and we therefore require AT&T to pay undiscounted construction charges pursuant to U S WEST's retail tariff.

D. Electronic Interfaces and Operational Support Systems (OSSs) (Issues 38, 39, 40, 41, 43, 43a, 44, 75, 81).

The FCC Order requires ILECs to provide, upon request, nondiscriminatory access to operational support system (OSS) functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing of unbundled network elements and resold services. The following issues relate to OSS functions and lend themselves to the synchronous discussion provided below:

Issue 38 - Scope of Interim Interfaces.

Issue 39 - Parity.

Issue 40 - End User Billing Interfaces.

Issue 41 - Wholesale Billing Interface.

Issue 43 - Notice of Outages; Quality.

Issue 43a - Real Time Monitoring; Testing.

Issue 44 - National Gateway(long-term interface solution).

Issue 75 - Maintenance.

Issue 81 - Transaction Capacity.

In order to provide access to operational support systems, ILECs need to develop electronic interfaces. To comply with this requirement U S WEST proposes a two-step solution with an initial interface and a long-term interface. The initial interface incorporates an internet "web page" technology for use by all CLECs and resellers of U S WEST services. The web page would remain in place and likely be used by small CLECs and resellers even after the long-term solution is developed and implemented. The long-term electronic interface, likely to be used only by users such as AT&T and other large CLECs, will be implemented once the national standards are developed.

U S WEST's testimony indicates that as of January 1, 1997, its initial OSS interface can support the functions of pre-ordering, ordering, provisioning, and maintenance and repair for

POTS[11] resold services. U S WEST further indicates that by July 1, 1997, its initial interface will support the same functions for unbundled network elements and design resold services (such as ISDN and Centrex), and by November 1, 1997, it will support additional repair and maintenance capabilities. According to U S WEST, it is committed to participating in the development of national standards for OSSs and it will incorporate the final OSS national standards in its long-term electronic interface to be accessed by CLECs.

AT&T and U S WEST agree on the long-term OSS solution which incorporates real-time electronic access to OSSs for pre-ordering, ordering, provisioning, maintenance and repair, and billing via a nationally standardized gateway. The parties differ, however, on what interfaces should be adopted in the interim and the time frame for their implementation. AT&T does not believe the web page is the optimal interim solution for these functions, but agrees to consider U S WEST's web page option as an interim solution for pre-ordering if U S WEST will provide the necessary specifications to ensure that AT&T can access U S WEST's systems at parity with U S WEST.

AT&T identifies a number of deficiencies with U S WEST's web page solution: (1) U S WEST delayed development of its proposal until after the FCC issued its August 8, 1996, Interconnection Order; (2) the web page does not work yet; (3) the web page solution is a human interface and is prone to error; (4) the web page is a "throw away" solution because most of the system development that CLECs will need to do to interface with the web page will not be needed with the "permanent solution;" (5) the web page provides service inferior to that which U S WEST provides itself; and (6) the web page, at least for now, does not support the OSS functions necessary for unbundled network elements and design services. AT&T also does not appear to agree with U S WEST's proposal to use CRIS, an end user billing system, as a billing

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[11] POTS is an acronym for "plain old telephone service."

interface (although at the hearing there was some testimony that indicated AT&T may have agreed, at least in principle, to the use of the CRIS system).

AT&T proposes that the ordering interface should be Electronic Data Interface (EDI); the maintenance and repair interface should be Electronic Bonding-Trouble Administration (EBTA); and the billing interface should be Billing Output Specification (BOS) format through the Integrated Access Billing System (IABS). AT&T explains these interfaces already exist, were designed according to industry standards, and have the potential to become the long term solution.

The Commission agrees that accurate, efficient and otherwise workable electronic interfaces into ILEC's OSSs are essential to enable CLEC's to successfully interconnect with, utilize unbundled network elements of, and/or resell services of ILECs such as U S WEST. ILECs such as U S WEST have the ability and the incentive to control the speed and methods of developing these interfaces and thereby delay the onset of local exchange competition. Electronic interface issues are central to many of the disputed issues in this arbitration including ordering processes, service quality, provision and availability of customer and network information, transaction capacities and other business processes.

Each of AT&T's criticisms of U S WEST's initial OSS electronic interface appear to have some merit, and U S WEST is directed to take action to correct those deficiencies where such action is possible. However, the Commission will not adopt AT&T's proposals for reconfiguration of U S WEST's electronic interfaces at this time. The record clearly demonstrates that definitive national standards for these OSS electronic interfaces are not yet developed. While the interfaces proposed by AT&T may reflect current trends for national standards, they are not recognized as the standards. The FCC has imposed certain requirements on ILEC's for developing access to OSSs and is monitoring ILECs' efforts towards compliance with those requirements. The FCC has stated it will not presently take any action with regard to companies which have not yet complied with the requirements as long as they are making good faith efforts to comply.

At present U S WEST's interface cannot support certain OSS functions, and thus does not comply with the FCC requirements. However, U S WEST is aware of the deficiencies and appears to be taking corrective actions. U S WEST indicates that by July 1, 1997, its interface will perform the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions for unbundled network elements and design service, and by November 1, 1997, it will support additional repair and maintenance capabilities. The Commission will hold U S WEST to its stated schedule and monitor U S WEST's progress by requiring it to file progress reports every three months beginning in July 1997. Because it is likely that U S WEST will develop uniform interfaces for use by CLECs throughout its 14-state region, the Commission orders that any improvements or revisions U S WEST makes, in response to other state commission orders, to its initial interface to accommodate the needs of CLECs also be available to CLECs in Montana. As this is an interim solution, the Commission will rule on U S WEST's electronic interface compliance when its initial OSS interface becomes fully operational.

For notices of outage, Matrix Issue 43, AT&T is requesting a level of service superior to that which U S WEST provides to itself. U S WEST states that it will provide AT&T with notice which is equal to that provided to itself, but will not provide the level of service requested by AT&T in its contract because AT&T wants superior quality service without providing higher compensation.

We agree with U S WEST. Based on AT&T's parity compensation package proposal, AT&T is entitled to no higher service quality than U S WEST provides itself. If AT&T wants superior service, and that service is technically feasible, U S WEST must provide it, but AT&T must compensate U S WEST for the reasonable cost of increasing the quality of service.

E. Local Number Portability (Issues 45-47).

According to § 251(b)(2) of the 1996 Act, U S WEST must provide technically feasible local number portability (LNP). LNP is "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one carrier to another." 47 U.S.C. § 153(a)(46).

The parties have agreed to the technical issues identified as local number portability issues, but not the issue of cost recovery.

Issue 46 - Pricing of Interim Number Portability (*see* Section K).

F. Access Issues (Issues 48a, 48b, 49-54, 56).

1. Issue 48a - Scope of Access (*see* Issue 50).

2. Issue 48b - Reciprocity.

Section 251(b)(4) of the 1996 Act places a duty on an ILEC to "afford access to poles, ducts, conduits and rights-of way of such carrier to competing providers of telecommunications services on rights, terms and conditions that are consistent with section 224." U S WEST acknowledges its duties to provide access to poles, ducts, conduits and rights of way that it owns or controls and to exercise its eminent domain authority to acquire additional facilities if needed for AT&T's equipment, but requests further that AT&T have reciprocal requirements imposed on it. AT&T contends that the FCC Interconnection Order does not impose this reciprocal obligation.

All telecommunications carriers have a duty under the 1996 Act to afford access to their poles, ducts, conduits and rights of way according to § 251(b)(4) of the 1996 Act. The FCC recognized this duty, but concluded that, because § 252 does not impose duties upon utilities other than ILECs, the arbitration process cannot be invoked in lieu of § 224 by an entity other than a telecommunications carrier seeking access to the facilities or property of an ILEC. FCC Interconnection Order, at ¶ 1230. Therefore, this proceeding is not a proper means for U S WEST to seek access to the poles, ducts, conduits and rights of way of AT&T. We further note that Montana has not preempted federal authority as permitted in 47 U.S.C. § 224 and does not regulate these access issues. U S WEST is subject to the provisions of § 224, which does not provide access rights to ILECs. *See* FCC Interconnection Order, at ¶ 1231; and 47 U.S.C. §§ 224(a)(5) and (f)(1).

The Commission concludes it has no authority under § 252 of the 1996 Act or other law to require AT&T to provide reciprocal access to its poles, ducts, conduits and rights of way to U S WEST.

3. <u>Issue 49 - Space Reservation</u>.

The parties state that this issue is agreed to in principle, but the matrix does not support a conclusion that it has been resolved. To the extent the parties have not agreed, this resolution will apply. U S WEST's position on this issue is that the ¶¶ 1165-1170 of the FCC Order permit it to reserve spare capacity on its facilities for its maintenance and administrative purposes, as needed to assure uninterrupted high quality service to customers and U S WEST will not make this space available to AT&T. AT&T requests that the terms of the ¶ 1170 FCC Order be adopted. AT&T cites the FCC Order for its argument that U S WEST may not reserve space for its own use to the detriment of a new entrant and, further, that any reservation of space must be based upon a bona fide development plan that reasonably and specifically projects a need for space in the provision of its core utility business.

The FCC Order distinguishes LECs from electric utilities, which have the right to reserve space if the reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service. However, an electric utility may not reserve or recover reserved space to provide telecommunications or video programming service and then force a previous attaching party to incur the cost of modifying the facility to increase capacity, even if the space reservation is pursuant to a reasonable development plan. <u>FCC Interconnection Order</u>, at §§ 1169-1170. While we agree with AT&T's assertion that U S WEST may not reserve space for its own use to the detriment of a new entrant, AT&T's position concerning a development plan is not applicable to a utility providing telecommunications or video services.

The 1996 Act prohibits an ILEC from favoring itself or its affiliate to the detriment of a would-be entrant into the local exchange market as this would favor the future needs of the incumbent LEC over the current needs of the new LEC. <u>Id.</u>, at ¶ 1170. The FCC concluded that permitting this would nullify the nondiscrimination that Congress required and also that 47 U.S.C. § 224(f)(1) prohibits such discrimination among telecommunications carriers. <u>Id.</u>, at ¶ 1170.

We are unable to find a section in U S WEST's contract that addresses this issue. We conclude that AT&T's contract language at Attachment 4, § 3.2.5 seems reasonable and is adopted. U S WEST may not reserve any more capacity than is necessary for maintenance purposes and may not reclaim any such reserved capacity for its own use to the detriment of CLECs. It is unclear from the testimony what is meant by administrative purposes and thus our conclusion does not extend to include them.

4. Issue 50 and Issue 48a - Modification of Facilities and Scope of Access.

This issue relates to a requirement requested by AT&T that U S WEST must take reasonable steps to accommodate requests for access to its poles, ducts, or conduit, including modifying those facilities to increase capacity, if necessary. Attachment 4, § 3.2.16 of AT&T's proposed contract states:

> USWC shall remove any retired cable from conduit systems or poles to allow for the efficient use of conduit space and pole spaces. USWC shall perform without delay any modification to innerduct systems that are necessary to allow access to and/or egress from the innerduct systems and CEVs. USWC must expand its facilities, including placement of taller poles or additional conduits, if necessary, to accommodate AT&T's request and shall do so within a reasonable period of time....

AT&T also requests that U S WEST provide it with an alternative if U S WEST determines that the requested access is infeasible. Section 9.4 of AT&T's proposed contract states:

> To the extent USWC proves infeasibility, USWC shall be required to provide to AT&T alternative suitable access which will not impair AT&T's ability to provide its telecommunications services. Such alternative access shall be technically equivalent to the requested access and shall be subject to the same terms, conditions and price as the requested access.

U S WEST argues that the 1996 Act does not require it to construct or rearrange any facilities for another carrier. However, U S WEST does agree to negotiate with AT&T for facilities construction or rearrangement and may voluntarily agree to rearrange or construct facilities in some circumstances.

The FCC concluded that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case by case basis. FCC Interconnection Order, at ¶ 1143. In ¶ 1163 the FCC states:

> We interpret §§ 224(f)(1) and (f)(2) to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access.

We find U S WEST's position generally consistent with the FCC's requirements on these matters. The FCC does not appear to require ILECs such as U S WEST to provide "alternative suitable access" if it denies a request because of capacity constraints or technical infeasibility. We conclude that the language referenced above from § 9.4 of AT&T's proposed contract imposes a requirement on U S WEST that goes beyond what the FCC requires and should be deleted. This is consistent with the Commission's decision on "Issue 1" regarding a similar requirement AT&T proposed in § 9.2 of its contract. If AT&T has a complaint regarding a U S WEST determination about access to its facilities, it can request arbitration pursuant to § 252 of the Act or it may invoke the complaint procedures described in ¶¶ 1222 - 1225 of the FCC's Order.

5. Issue 51 - Licenses for Restricted Rights of Way.

The parties disagree about the extent U S WEST must exercise its eminent domain powers on behalf of AT&T. AT&T contends that U S WEST has a duty to affirmatively assist AT&T in gaining access to restricted rights of way and is in the best position to negotiate for increased access because of its existing relationships with grantors and licensors. U S WEST argues that AT&T must make its own arrangements with the grantor or licensor in order to gain access.

Paragraph 1181 of the FCC Interconnection Order places a duty on the incumbent to take reasonable steps to exercise eminent domain powers to expand existing rights of way over private property for the benefit of third parties, just as it would be required to modify poles or conduits to permit attachments. U S WEST has not referenced a contract section in its proposed agreement. AT&T's contract language at Attachment 4, §§ 3.2.1, 3.2.3, 3.2.4, and 3.2.5 appears reasonable and is adopted.

6. <u>Issue 52 - Dialing Parity for Local Calls (resolved by the parties)</u>.

7. <u>Issue 53 - Operator Services and Directory Assistance</u>.

The parties appear to agree on these issues, but have not stipulated to contract language. Although there may be contested sections of the proposed contracts, we are unaware of the specific disagreements. Therefore, we decline to decide this issue.

8. <u>Issue 54 - (*see* Issue 30: Branding)</u>.

9. <u>Issue 56 and Issue 57 - Call Completion Services and Access to Directory Assistance Database</u>.

U S WEST states that it will offer call completion services on a resold basis, but lacks the billing and recording capabilities to offer the services to CLECs who originate directory assistance traffic from their own switches. U S WEST agrees to develop such capabilities if AT&T pays for them and provides commitments regarding traffic volume and locations at which the service is to be provided.

Similarly, U S WEST also agrees to provide access to its directory assistance database if it is reimbursed by AT&T for its costs of deploying the service and if AT&T provides commitments regarding traffic volume and the locations at which the services will be provided.

AT&T states that pursuant to the FCC's Interconnection Order, U S WEST must provide both call completion services and directory assistance databases on an unbundled basis and priced at TELRIC.

The Commission agrees with AT&T that pursuant to ¶¶ 534 - 539 of the FCC Interconnection Order, U S WEST must, to the extent technically feasible, provide nondiscriminatory access to call completion services and access to directory assistance databases as separate network elements. We find that the record in this case does not provide sufficient information to establish any rates for these services, therefore, if AT&T requests these services, U S WEST shall determine reasonable TELRIC-based prices for the services (including development costs). Pricing for call completion services and access to directory assistance databases on an unbundled basis may be revisited in the generic U S WEST costing and pricing docket. AT&T's contract at Attachment 3, § 7.3.2.3 should be revised to reflect this decision, as well as to provide more clarity.

10. Issue 57 - Access to Directory Assistance Database.

G. Access to Number Resources (Issues 58-62-77).

1. Issues 58 - Busy Line Verification/Busy Line Interrupt.

Although the parties have resolved the substantive issue, no contract language has been stipulated. If the parties have not reached agreement prior to Commission resolution, we adopt the contract language from U S WEST's §§ 9.6.1 through 9.6.5, which appears to be reasonable and is clearer and more comprehensive than AT&T's referenced terms.

2. Issue 62 and Issue 77 - E-911 and E911/911.

The parties appear to agree on these issues, but have not stipulated to contract language. Although there may be contested sections of the proposed agreements, we are unaware of the specific disagreements. Therefore, we decline to decide this issue.

H. Ancillary Services and Branding (Issues 53, 55, 60-62, 67-69, 76). Issues of costing and pricing of ancillary services and rebranding remain.

1. Issue 53 - Operator Services and Directory Assistance Unbundling.

The parties have agreed in principle but differ on contract language for this issue. U S WEST has agreed to provide unbundled branded and unbranded directory and operator call completion services where technically feasible. U S WEST and AT&T disagree, however, on whether U S WEST's contract language should be adopted. U S WEST's contract permits it to charge 34 cents per call for directory assistance. It also permits U S WEST to charge 35 cents per call for directory call completion services pending the completion of an approved TELRIC cost study. Further, prices for services related to directory assistance and operator services, according to U S WEST's proposed contract, will be determined through the Network Interconnection and Unbundled Element Request Process.

We adopt U S WEST's position and its contract language as an interim solution on this issue, with permanent resolution left to the generic costing and pricing docket to be initiated by the Commission. This section should be integrated with AT&T's contract sections.

2. Issue 55 - Trunking.

The parties have agreed in principle, but have not agreed on specific contract language. We are unable to determine from the record what is not resolved and, therefore, we decline to decide this issue.

3. Issue 60, Issue 61 and Issue 76 - Listings, Directories and Yellow Page Advertising.

This issue is complicated by the fact that U S WEST has established its directory publishing operations as a separate affiliate. U S WEST states that it will provide AT&T with directory assistance listings and forward AT&T's listings to directory publishers with AT&T's permission. Except for the white page listings required by the Act, U S WEST argues that AT&T must negotiate directory issues with directory publishers, including its affiliate U S WEST Dex, because it does not publish any directory. U S WEST also will not agree to provide call guide pages for AT&T, include AT&T's brand on a U S WEST Dex directory, recycle AT&T's directories, negotiate with AT&T for directory distribution, include a yellow page listing at no charge, or forward AT&T's listings to publishers if AT&T insists on sharing revenues from sales of such listings. U S WEST refuses to negotiate any yellow page issues based on it claim that yellow page listings are not required by the Act and must be negotiated with directory publishers. U S WEST also will not provide two listings as requested by AT&T for AT&T's customers with interim number portability, claiming only one listing is required--the portable telephone number. AT&T may obtain additional listings for its customers at the wholesale rate for the second listing. AT&T also contends that U S WEST should be required to provide one white and one yellow page listing at no cost to AT&T or AT&T's customers and to make available enhanced white page listings.

We find nothing in the FCC Order or the 1996 Act to provide much guidance on this issue. Section § 251(b)(3) states that LECs must permit competing providers to have "nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays." Section 271(c)(1)(B)(viii) requires U S WEST to provide white pages directory listings for customers of the CLEC's telephone exchange service to meet the competitive checklist for allowing U S WEST to provide in-region interLATA toll service. The Act's general provisions that relate to the overall decision in this proceeding require that we do not issue a ruling that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. 47 U.S.C. § 253(a). Further, nothing in § 253 "affects the ability of a state to impose, on a competitively neutral basis and consistent with § 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). The Montana Telecommunications Act (MTA) provides, "Nothing in this section is to be construed to effect the regulatory treatment of revenues, expenses, and investment for telephone directory services currently authorized under this title." Section 69-3-806(2), MCA. This Commission's rules contain limited requirements for telephone directories at ARM 38.5.3336. Finally, U S WEST has provided little assistance for our decision on this matter, asserting that AT&T must negotiate with its publisher affiliate, the name of which has recently changed from U S WEST Direct to U S WEST Dex.[12]

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[12] For all information concerning U S WEST Dex cited in this Order, the Commission referred to the Helena, Montana, and surrounding area, U S WEST Dex directory published March 1997.

An overarching goal of federal and Montana law is to encourage fair competition and remove barriers to competition. An affiliate of an ILEC with monopoly power has little incentive to negotiate in good faith to ease entry by a competitor. The U S WEST Dex directory is published on behalf of U S WEST, according to the matrix, the testimony of Cheryl Gillespie, and resale agreements between U S WEST and resellers which have been submitted to and approved by this Commission. Customers using the U S WEST Dex directory with the present format are not provided with information which indicates U S WEST Dex and U S WEST Communications, Inc. are two separate companies. In fact, the first page of the directory includes a list of frequently called numbers for U S WEST Communications, highlighted in bright yellow, and with nothing to indicate the companies are not one and the same. To achieve the goals of federal and Montana law, the directory must not discriminate against CLECs to the benefit of U S WEST. With the policies and purposes of Federal and Montana law in mind, the specific issues raised are decided as follows:

a. <u>White and Yellow Page Listings</u>.

The unresolved issue is whether U S WEST should be required to provide both white and yellow page listings at no cost to AT&T or AT&T's customers and to make available enhanced white page listings. U S WEST claims yellow page listings are not required by the 1996 Act, and must be negotiated with publishers. The Act requires U S WEST and other Bell Operating Companies (BOCs) to provide white pages listings for customers of the other carrier's local exchange service, but is silent regarding yellow pages. *See* 47 U.S.C. § 271(c)(1)(B)(viii). U S WEST sells white page listings to U S WEST Dex. U S WEST provides billing and collection services for U S WEST Dex's advertising, but has not indicated that its customers are charged an additional amount for a single yellow page listing. There is nothing in the record to indicate that the free business listings which U S WEST Dex includes in the yellow pages for U S WEST customers are any different from the white page listings for its business customers or that they are not provided from the same database. Similarly, there is nothing to indicate that U S WEST does not receive compensation for these listings in the same manner as for its white pages listings. Further, there is nothing provided that would place single-line yellow pages listings in the same category as paid advertising, which is appropriately treated in a different manner and which provides U S WEST Dex with high profits. This information is within the control of U S WEST. Because we conclude that the business listings included in the yellow pages stem from the same database, U S WEST must provide a yellow page listing at no cost as well as the white page listing for business customers of AT&T. Any enhancements to these simple listings are not covered by this ruling.

b. Call Guide Pages.

U S WEST asserts that AT&T must negotiate with U S WEST Dex , which publishes directories on U S WEST's behalf. ARM 38.5.3336(5) provides that the directory must contain calling instructions (for local and long distance calls, calls to repair and directory assistance services) and locations and telephone numbers of exchange carrier business offices for the appropriate service area. ARM 38.5.3336(6) requires that exchange carriers must make space available at--"reasonable" charge--in the front part of the directory for interexchange carriers information, including information on directory assistance and operator services, for billing inquiries and other information. The requirement that the exchange carriers make space available for interexchange carriers should be equally applicable to new local exchange carriers. This information is in the public interest, and more importantly under the 1996 Act, may constitute a barrier to entry if not provided. The ILEC may not be competitively advantaged by the camouflage of a separate affiliate. Although AT&T may reasonably be required to negotiate call guide pages with U S WEST Dex representatives, U S WEST is obligated to provide information so that AT&T can be assured that information in call guide pages is not negotiated or provided in a discriminatory manner or is not competitively neutral.

c. AT&T Information on Directory Cover.

U S WEST contends that is it impractical to include logos of all local exchange providers on the cover of the U S WEST Dex directory, and it should not have to include the AT&T brand on the cover. It further asserts that even its own brand is not on the cover of the U S WEST Dex directory.

This Commission's rule requires three things on the front cover of directories: (1) the name of the exchange carrier, (2) the area included in the directory, and (3) the month and year of issue. *See* ARM 38.5.3336(4). The rule does not require the name of the publisher. We note the current issue just released includes the established U S WEST logo as well as the new "Dex" (Your Directory Expert) logo. U S WEST has access to Commission rules and we will presume that it intended to comply with the rule by including its logo. It does not separately identify "U S WEST Communications, Inc." Although our rule requires the AT&T name on the cover as an exchange carrier and does not require the AT&T logo, so long as U S WEST includes its logo which is also identified with its local exchange company, it must also include other exchange carriers' logos in order to comply with the 1996 Act.

For this and other issues relating to U S WEST Dex, we will require that all local exchange providers be treated the same. There must be equitable or equal space allocations for CLEC and ILEC information in the call guide pages and CLECs must be treated at parity with U S WEST in all respects.

d. Directory Recycling.

U S WEST argues that AT&T must negotiate recycling of AT&T directories with U S WEST Dex. The directories provided to end user customers are not "AT&T directories" nor are they "U S WEST Communications, Inc.'s directories." The directories are "U S WEST Dex directories." This is clear from page 24 of the current U S WEST Dex directory's "Community pages." According to page 24, outdated directories are collected through arrangements with other environmentally responsible businesses to provide drop-off locations, and then recycled by or on behalf of U S WEST Dex. Although the record contains insufficient information for the Commission to determine whether or not an arrangement exists between the affiliated companies regarding recycling, U S WEST witness Cheryl Gillespie testified that AT&T customers will be able to recycle their directories through the same options available to U S WEST Communications, Inc. customers. However, if a contract exists which evidences this arrangement, and to the extent this requires negotiation with U S WEST Dex, U S WEST may not refuse to provide AT&T with pertinent information regarding recycling.

e. Directory Distribution.

U S WEST contends that this is yet another issue that must be negotiated with U S WEST Dex. AT&T should negotiate with U S WEST Dex, but again may require that U S WEST provide information from which AT&T can discern whether it is being treated in a manner consistent with the 1996 Act.

f. Paid Yellow Page Advertising.

AT&T requests that U S WEST act as AT&T's agent in assisting AT&T end users in placing yellow pages advertisements. This appears to be a complex issue which has not been developed to the degree necessary for the commission to resolve.

g. Sale of Listings - Compensation.

AT&T requests that U S WEST share revenues which U S WEST receives from the sale of listings. U S WEST's contract provides two options--one which compensates AT&T but does not forward listings and one which does not compensate AT&T and does forward listings. The record contains insufficient information from which to decide this issue. However, we conclude that U S WEST may not forward listings for AT&T's customers without AT&T's permission to publishers or parties other than U S WEST Dex.

h. Listings for Interim Number Portability.

AT&T also requests that U S WEST provide two listings for AT&T customers with interim number portability. U S WEST contends that only one listing is required--the portable telephone number. U S WEST will provide additional listings to AT&T's customers at the wholesale rate for a second listing. U S WEST's position on this issue is reasonable and consistent with the 1996 Act.

4. Issue 62 and Issue 77 - E911 and E911/911 Call Routing.

The parties appear to agree on these issues, but have not stipulated to contract language. Although there may be disputed sections of the proposed agreements, we are unaware of the specific disagreements. Therefore, we decline to decide this issue.

5. Issue 67 - Costs U S WEST May Recover (*see* Section K).

6. Issue 68 - Charge for Loop Conditioning (*see* Section B, Issue 15).

7. Issue 69 - Bill and Keep.

AT&T recommends that bill and keep be adopted for transport and termination if the traffic exchanged is fairly balanced, with the burden placed on U S WEST to prove that traffic is not in balance. U S WEST agrees with AT&T that the charges should be identical for transport and termination, but proposes that the parties jointly perform monthly traffic audits, based on mutually agreed measurement criteria and auditing standards. U S WEST also proposes that the call termination charge but not the transport charge be waived in any month in which the traffic terminated by each party is within five percent of being in balance.

The FCC Order at ¶ 1111 provides that states are permitted to establish a presumption that traffic is in balance. Under such a presumption, bill and keep is justified unless a carrier seeking to rebut this presumption satisfies its burden of proof. However, the FCC further concluded that if state commissions impose bill and keep arrangements, the arrangements must include provisions that impose compensation obligations if traffic becomes significantly out of balance. FCC Interconnection Order, at ¶ 1113. A drawback of bill and keep identified by the FCC is that bill and keep arrangements may not be economically efficient because they can distort carriers' incentives by encouraging them to overuse competing carrier's terminating facilities by seeking customers that primarily originate traffic. Id., at ¶ 1112.

The Commission agrees with U S WEST's position and adopts it to the extent that the parties are able to accurately measure terminating traffic. In determining whether traffic is balanced, the FCC stated that precise traffic measurement is not necessary and that approximations based on samples and studies comparable to reports on percentages of interstate use often used for access charge billing is sufficient. Id., at ¶ 1114. We agree with this conclusion as it may reduce implementation costs and administrative burdens.

I. Service Quality (Issues 34, 43, 63, 64)/Business Processes (Issues 37a, 37b, 56, 59-62, 72-77, 80, 82).

1. Issue 34, Issue 63 and Issue 64 - Service Quality Credits, Quality Standards and Performance Credits.

AT&T proposed service and electronic interface quality requirements, requesting that the Commission adopt an exhaustive list of quality measures for U S WEST. According to its proposal, AT&T would receive credits against charges due if U S WEST did not meet the requirements. The credits would apply if U S WEST failed to comply with the service quality standards established by the FCC, this Commission, or AT&T's interconnection agreement.

AT&T would also require service quality on its terms, even if that level of quality is superior to what U S WEST provides itself. AT&T asserts that this is the only mechanism that will provide U S WEST with the incentive to meet the quality standards.

AT&T's Direct Measures of Quality (DMOQ) proposal requires U S WEST to provide all local services, network elements or combinations in accordance with performance standards specified in its contract. AT&T supports its proposal for DMOQs with cites to §§ 251(c)(2)(C) and (D) of the 1996 Act, and the FCC Order and 47 C.F.R. § 51.311(b). These cites support the requirement that an ILEC must provide service that is equal in quality to the service that it provides itself and that the service must be provided on rates, terms, and conditions that are just, reasonable, and nondiscriminatory and in accordance with the terms and conditions of the agreement. AT&T claims that U S WEST has refused to provide information regarding its internal quality standards, and thus the standards in its contract should be adopted. AT&T also asserts that U S WEST refuses to discuss performance standards, and professing that its policy is to be accountable only to end user standards established by the states. AT&T contends that without DMOQs, AT&T will only have U S WEST's assurance that it is receiving equal treatment.

In Attachment 11, pp. 14-16, of AT&T’s proposed agreement, AT&T sets out 83 DMOQs that may be used to assess U S WEST’s monthly performance. These DMOQ's would be used to calculate the performance credit, with each DMOQ assigned a performance index: Fail -10, Approaches -5, Meets 0 and Exceeds +5. As described by AT&T, each month a DMOQ performance index would be calculated from the mean value of all applicable individual performance ratings for that month. The following is an example calculation provided by AT&T in its Agreement:

Example 1: There are 30 DMOQs. For the current month,

3	DMOQs are rated fail
16	DMOQs are rated approaches
10	DMOQs are rated meets
1	DMOQ is rated exceeds

The overall performance index for the month is:

$$\frac{(3 \times -10) + (16 \times -5) + (10 \times 0) + (1 \times 5)}{30} = -3.5$$

With the -3.5 performance index calculation above, AT&T would receive a 3.5 percent credit applied to its bill for this month according to the terms in AT&T's proposed agreement.

U S WEST acknowledges that the 1996 Act and the FCC Order require it to provide services to CLECs at the same level it provides to itself, its affiliates or its customers. U S WEST opposes AT&T's proposed DMOQs and credits. U S WEST contends that AT&T's proposed DMOQs do not relate to the Act's requirement that U S WEST provide service at parity, but rather, they are intended to establish a particular level of service which may exceed that which U S WEST currently provides itself. USW further contends that AT&T's DMOQs would impose a significant operational and financial burden on U S WEST because the measures would require new equipment, processes and operational support systems.

The 1996 Act requires U S WEST to provide new entrants with a level of service that is equal in quality to that which it provides itself. This standard guarantees that AT&T will have an equal opportunity to compete with U S WEST and other CLECs. From our review of the proposed DMOQs, it appears that U S WEST's assertions may be correct. AT&T may request superior service from U S WEST, but U S WEST may require compensation for providing such service. The record in this proceeding does not provide for compensation for a higher level of service.

Given that AT&T's proposed compensation package contemplates the parity standard for quality of service, as an interim solution, the Commission does not approve AT&T's DMOQs. U S WEST must comply with existing service standards. U S WEST shall provide all industry standards currently relied on for provisioning of service for purposes of including them in the parties interconnection agreement. U S WEST shall provide monthly reports containing service quality data so that AT&T can monitor the quality of service provided by U S WEST.

The Commission will initiate a generic docket to review and establish permanent minimum quality of service standards and measurements to be applied uniformly throughout the industry.

The Commission also rejects the performance credits during the pendency of the interim standards. If AT&T believes that U S WEST is violating the interim standards, AT&T is not without remedies under the contract or existing law.

2. Issue 37a - Customer Information.

AT&T proposes that U S WEST notify it at least 45 days in advance of any changes in terms or conditions under which services are offered at retail to subscribers, including introduction or discontinuance of features, functions, services or promotions.

U S WEST argues that it is unreasonable and overly burdensome for it to be required to notify AT&T of changes to the U S WEST retail tariff and that AT&T is capable of monitoring these changes.

The Commission agrees with U S WEST. U S WEST is required to seek Commission approval prior to making any changes in terms or conditions in its retail tariffs, and to introduce, discontinue, or discount features, functions, services or promotions. However, we conclude it is reasonable to require U S WEST to notify AT&T and other resellers of any such requests or filings that it submits to the Commission regarding any changes to its retail tariff. This practice should provide adequate notification to the reseller regarding changes proposed by U S WEST, and allow the reseller an opportunity, if it wishes, to comment on the proposals before the Commission acts on them.

3. Issue 37b - Customer Privacy.

No cites to contested sections of the proposed interconnection agreement(s) are provided and neither party defines specific areas of disagreement surrounding the issue. The Commission concludes that the contract language proposed is substantially similar for the most part and in fact is in some sections identical, including the level of comprehensive detail. Therefore, our decision to adopt AT&T's contract includes AT&T's proposed contract language in its "Nondisclosure/Confidentiality and Proprietary Information" section.

4. Issue 72 - Quality Management.

The parties appear to agree on these issues, but have not stipulated to contract language. Although there may be contested sections of the proposed agreements, we are unaware of the specific disagreements. Therefore, we decline to decide this issue.

5. Issue 73 - Service Order Process.

Attachment 5 to AT&T's proposed contract contains an extensive provisioning and ordering process. AT&T requests that it be allowed to order each of the elements individually or in combination and that U S WEST deploy network facilities in all of its serving areas on a timely basis for each of the elements. AT&T also desires a single point of contact with an electronic interface available 24 hours a day and 7 days a week for ordering and provisioning.

AT&T describes electronic interfaces for transferring and receiving orders, service completion, and other provisioning data. AT&T requests that it have real time access to customer profiles, names and address information, identification of features, and services subscribed to by a customer. AT&T further states that this information is necessary to obtain each local switching element and all technically available features or functions from a specific U S WEST switch. AT&T requests that the order format and data elements use standard elements developed by the industry's Order and Billing Forum. AT&T also sets out specific performance requirements and completion intervals. AT&T wants 90 percent of all orders completed by the desired due date, 98 percent of all orders completed by the committed due date, and at least 99 percent of all orders completed without error.

In general, U S WEST opposes requirements such as those contained in AT&T's Attachment 5. U S WEST refers to the 1996 Act, which obligates it to provide nondiscriminatory service to its competitors--the same standard of service that it provides itself.

The Commission agrees with AT&T that a standard provisioning and ordering process should be adopted by the parties. However, the Commission rejects AT&T's Attachment 5.

AT&T's contract proposal assumes parity of service in its proposed compensation package, and U S WEST should be held to no higher standard on service order installation intervals than those normally used by U S WEST or required by Commission rules. We also reject Attachment 5 because it relates to the long-term Operational Support System (OSS) electronic interface solution. Thus, the intervals and electronic provisioning formats contained in the attachment may not conform to the national standards that are eventually developed.

As understood by the Commission, U S WEST's initial interface will ultimately provide AT&T with all of the provisioning and ordering processes available to its personnel. If so, U S WEST will be in compliance with the Act's requirement of providing nondiscriminatory service.

6. Issue 74 - Customer Usage Data.

AT&T's proposed contract requires U S WEST to provide AT&T with customer usage data recorded by U S WEST for local and intraLATA toll services in accordance with very detailed specifications, format and reporting requirements. These detailed specifications and requirements are found in Attachment 8 of AT&T's proposed agreement, and include a complete set of associated Direct Measures of Quality (DMOQs). U S WEST proposes contract language stating that U S WEST will provide daily usage data to AT&T with the same level and precision of accuracy that it provides to itself.

This issue is closely related to other issues in this matter which involve imposing AT&T's standards on U S WEST. Both parties agree that customer information must be provided to AT&T by U S WEST, but they disagree on the level of detail necessary in the contract to govern how that provisioning should occur. U S WEST should provide the necessary information to AT&T at parity with the manner in which it provides the information to itself. If AT&T desires superior standards, including higher standards than U S WEST provides to itself and standards higher than U S WEST is currently capable of providing, it must negotiate this provisioning with U S WEST.

7. Issue 80 - Technical Publications.

As a matter of network quality and assurance of performance, AT&T asserts that either a third party or AT&T publications should govern the technical parameters of the agreement.

AT&T states that without such standards U S WEST can unilaterally redefine technical specifications. U S WEST resists AT&T's proposal that it adhere to each and every aspect of the technical standards documents made part of AT&T's proposed interconnection agreement claiming it does not presently adhere to every aspect of AT&T's proposed standards. U S WEST further asserts that the 1996 Act does not impose a duty to re-engineer its network to conform to AT&T's desired list of technical standards. U S WEST also objects to § 31.1 of AT&T's proposed agreement, which would permit AT&T to elect the applicable standard if inconsistency exists between or among publications or standards.

The Commission agrees that technical standards are necessary to assure network quality and performance, but is reluctant to approve the standards as contained in the AT&T contract. The testimony in this proceeding clearly establishes that at least some of the standards contained in the AT&T document, such as Bellcore's TR-303 standard, are not available or are standards that U S WEST does not currently employ. Given that we have not had the opportunity to review each standard proposed by the parties, we conclude that U S WEST shall provide AT&T with a list of all technical publications and standards under which it currently operates and these standards shall be incorporated into the final agreement.

8. Issue 82 - Infrastructure Process.

AT&T states that an established process for handling repair and maintenance of collocated equipment is needed to ensure efficient and effective resource utilization when repair and/or maintenance of equipment is required. U S WEST argues that such business processes are not required by the 1996 Act and are beyond the scope of the Commission's jurisdiction. According to U S WEST, this proposal is an attempt by AT&T to manage its business.

No cites to contested sections of the proposed interconnection agreement(s) are provided and neither party defines specific areas of disagreement surrounding the issue. Because it was inadequately developed, the Commission declines to decide this issue and all references in the AT&T contract to such a process shall be deleted.

J. Dispute Resolution (Issues 65 and 66).

Both parties appear to agree that an alternative dispute resolution process (ADR) should be used as the primary means to resolve disputes arising under the arbitrated agreement.

1. Issue 65 - Form of Dispute Resolution Agreement.

AT&T has proposed a comprehensive dispute resolution process, with a "sitting arbitrator" to minimize the education process with each new dispute. AT&T argues that its proposal is a proper screening device to assure that only those significant issues over which the Commission has the expertise are brought before it and that it is not to be used as a substitute for a party's right to bring a complaint before the Commission. AT&T's proposal provides for both informal and formal resolution of disputes. Both U S WEST and AT&T agree that ADR results should be binding, but AT&T adds the proviso that the award be binding unless the Commission determines to review the award upon its own motion or the motion of either party. U S WEST takes a minimalist approach in its suggested ADR contract term, although it incorporates much of the same provisions. U S WEST proposes a single arbitrator engaged in the practice of law.

We conclude AT&T's more comprehensive proposal should be used with some modifications. If the Commission is involved in ADR, there is no more reason to permit reconsideration of the award than there would be with another arbitrator, particularly on the Commission's own motion. If U S WEST subsequently agrees to this review, it may be included in the ADR section but we will not require this.

2. Issue 66 - Arbitrator Fee Awards.

In its closing brief, AT&T proposes that the arbitrator have discretion to impose the costs of the arbitration upon the loser in order to encourage the parties to resolve disputes short of ADR if possible and to assure that neither party abuses the ADR process. However, the contract provision included in AT&T's proposed ADR section would impose fees on the losing party. U S WEST proposes that each party pay their own costs.

The Commission agrees with AT&T that in a situation such as this agreement will cover where one party may have an incentive not to resolve disputes expeditiously and when the interests of the parties have great potential for conflict, it is better to allow the arbitrator to use discretion in awarding fees than to require that each party pay its own costs. However, AT&T's

contract does not expressly provide what AT&T's testimony advocated. Mr. Thayer testified that AT&T's contract infers that the loser does not necessarily pay and that it is implied that the loser will not pay if good faith is used in the bringing of the arbitration. We concur with the concept embedded in Mr. Thayer's oral testimony and conclude that whether or not the loser pays should be left to the discretion of the arbitrator. The contract term should be revised to so state.

K. Pricing for Unbundled Elements, Interconnection, and Collocation (Issues 42, 46, 67, 70-71).

Section 252(d) of the 1996 Act contains the pricing standards that state commissions must use in arbitration proceedings under the Act. The standard for interconnection and network element charges is:

> (1) INTERCONNECTION AND NETWORK ELEMENT CHARGES - Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--
>
> (A) shall be--
>
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
>
> (ii) nondiscriminatory, and
>
> (B) may include a reasonable profit.

The FCC concluded that states should set arbitrated rates for interconnection and access to unbundled elements pursuant to a "forward-looking economic cost" pricing methodology. FCC Interconnection Order, at ¶ 628. According to the FCC, the prices that new entrants pay for interconnection and unbundled elements should be based on the ILEC's Total Service Long Run Incremental Cost (TSLRIC) of a particular network element (which the FCC labeled "Total Element Long Run Incremental Cost" or "TELRIC"), plus a reasonable share of forward-looking joint and common costs. Id., at ¶ 672. TELRIC should be based on costs that assume wire centers will be placed at the ILEC's current wire center locations, but employing the most efficient technology for reasonably foreseeable capacity requirements in determining costs for reconstructing the local network. Id., at ¶ 685.

The FCC's detailed, prescriptive rules for states to follow when establishing prices for interconnection and unbundled network elements are currently stayed by the 8th Circuit. The question whether the FCC has jurisdiction with regard to these pricing rules was the key reason for the Court's stay order. Nevertheless, both AT&T and U S WEST generally believe the FCC's TELRIC methodology is correct, and have presented pricing models in this proceeding that they claim are consistent with this methodology. The results of the parties' models differ drastically. The central dispute on this issue is which model to use. Once that is resolved, we must determine the appropriate prices for the unbundled elements.

AT&T's Pricing Model: AT&T uses the "Hatfield Model" to develop the prices for unbundled network elements based on TELRIC. AT&T explains that the Hatfield Model uses engineering standards and methods applicable to the local exchange network to estimate the costs that would be incurred by an efficient firm to provide the relevant network functions and basic exchange service (narrowband, voice-grade telephone service) that are currently provided by ILECs in Montana. AT&T proposed prices for the following: loop distribution, loop concentrator/multiplexer, loop feeder, end office switching, operator systems, transport, tandem switching, and signaling elements. These prices are geographically deaveraged into seven density zones.

U S WEST's criticisms of the Hatfield Model are: (1) its inability to price all of U S WEST's services; (2) it assumes an engineering design that severely underestimates the quantity of distribution plant required; (3) it uses unsupported, unverified, and inconsistent assumptions that are not U S WEST specific; (3) it is based on unrealistic assumptions regarding the sharing of cable installation costs; (4) it uses non-economic depreciation and cost-of-capital; (5) it assumes inaccurate line counts; and (6) it uses flawed drop cost and fill factor assumptions. U S WEST contends that the Hatfield Model should not be used in this proceeding because its results do not represent accurate costs of providing service in Montana.

U S WEST argues that due to poor model documentation and write-protected inputs, the Hatfield is difficult to operate. However, U S WEST did perform a "systematic sensitivity analysis" of the model to derive dramatically different costs per loop than AT&T's proposals. AT&T's proposed aggregate loop costs are $20.09 per month. U S WEST's revisions produce a loop cost of $46.27 per month.

U S WEST's Unbundled Element Pricing Proposals.

U S WEST believes that interconnection and unbundled network element prices should not only cover its relevant forward-looking costs, but its actual embedded costs as well. U S WEST proposes to offer interconnection and unbundled network elements as part of its "Local Interconnection Service" or LIS, which it describes as a family of unbundled service elements available to companies that decide to compete with U S WEST in the provisioning of local exchange service. LIS includes links (or loops), ports, expanded interconnection channel termination (EICT), entrance facilities for collocators, switching, transport, entrance facilities for CLECs who choose not to collocate, and service provider number portability. U S WEST provided proprietary summaries of the cost studies for each of these elements, in addition to proprietary summaries of nonrecurring costs for the interconnection services.

In general, U S WEST describes the TELRIC methodology as follows. First, the service and product components are defined. Second, the network equipment and service-specific equipment investments are calculated, using "special studies" or investment cost models. Third, recurring expenses related to the service are calculated, including ongoing capital costs and operating expenses. This step utilizes various cost factors developed by U S WEST. In addition to the recurring cost studies which calculate monthly costs of elements, U S WEST also developed nonrecurring costs which it describes as the one-time expenses incurred at the time the service is established, disconnected, or changed. U S WEST describes the five-step sequence it used to develop these non-recurring costs.

U S WEST developed prices for local and tandem switching; tandem-switched transport; links (both two-wire and four-wire); common channel signaling access capability; DS1 service; DS1 Direct Trunk Transport; Physical/Virtual EICT DS0, DS1, and DS3; DS3 switched transport components; DS3 entrance facility/electrical; central office multiplex (DS3 to DS1); STP monthly cost/port; two-wire analog end office line port; remote call forwarding; operator services; physical and virtual collocation; and directory assistance. U S WEST did not propose geographically deaveraged prices and contends that prices for unbundled elements should not be geographically deaveraged until such time that the prices for retail basic exchange services are also deaveraged. In addition, the prices proposed by U S WEST include the TELRIC result plus "an allocation of common costs." According to U S WEST, the pricing of network elements must allow it to recover its actual (embedded) costs. U S WEST's local and tandem switching pricing proposals also include an increment to recover its "depreciation reserve deficiency."

AT&T's criticisms of U S WEST's cost studies focused on U S WEST's loop cost study which U S WEST calls its RLCAP study. These criticisms include: (1) cable sizes for distribution areas are fixed at small sizes; (2) fill factors are smaller than could be achieved; (3) facilities are based on old technology; (4) facilities are not used by U S WEST to provide POTS; (5) RLCAP is generic, not state or geographic area specific; (6) buried cable placement costs are too high; and (7) the study is too dependent on "factor databases" that were developed by and are under the sole control of U S WEST. When AT&T "corrects" U S WEST's RLCAP model for some of these criticisms, the model derives a loop cost of $23.51 per month rather than U S WEST's result of $45.83/month.

AT&T also argues that U S WEST's non-recurring cost studies are seriously flawed. The criticisms of U S WEST's nonrecurring cost studies include: (1) they are significantly higher than charges U S WEST assesses its own end users for similar functions; (2) they do not reflect the least-cost forward-looking technology; (3) they do not adhere to the principle of cost-causation; (4) they include recurring costs; (5) they fail to account for economies of scale; and (6) the model does not allow for independent replication, verification and analysis.

Finally, AT&T argues that prices for unbundled network elements should only reflect forward-looking costs and disagrees with U S WEST's proposal to recover embedded costs including its depreciation reserve deficiency.

General Observations and Conclusions: First, the Commission finds that both parties' studies are flawed, but due to the complexity of the studies and the short time frame in which to arbitrate, it is impossible to conduct a thorough review of each of the studies. We conclude that it is appropriate to establish interim rates to the greatest degree of accuracy possible. We will establish permanent rates in a separate generic U S WEST costing and pricing docket where the parties can focus on costing and pricing issues and related policy matters.

Second, the list of elements and services and the accompanying price proposals submitted by the parties are not identical. Where only one of the parties proposed a price for a particular element or service, we conclude that price should be adopted as the interim price.

In Docket No. 96.9.150, Order No. 5449a, In the Matter of Western Wireless Corporation's Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Rates, Terms, and Conditions of Interconnection With U S WEST Communications, Inc., the Commission found as follows regarding U S WEST's proposal to recover its alleged depreciation reserve deficiency:

> 1. At the hearing Mr. Hayhurst was questioned about U S WEST's ability to include a depreciation reserve deficiency as a cost component of rates. Mr. Hayhurst admitted that before the Commission has allowed recovery of depreciation reserve deficiency in prior cases, it has conducted an inquiry into the magnitude of the deficiency as well as the appropriate amortization period. He agreed that generally the Commission allowed recovery of such deficiencies over the remaining life of the assets. He further admitted that the five-year amortization of the deficiency proposed in this Docket was not equal to the remaining life of the assets.
>
> 2. Mr. Hayhurst noted that the Commission had permitted U S WEST to recover expenses more rapidly in the past, and argued that this procedure was warranted for the depreciation reserve deficiency U S WEST has alleged in this proceeding. He testified that one of the two cases he knew of was the conversion of all step-by-step and No. 5 crossbar offices to electronic offices, with recovery over the three-year life of the project; the other was RTIP where the Commission permitted the amortization of aerial wire for rural service upgrades over a period of five years. However, Mr. Hayhurst agreed that generally, when an asset life is shortened, the reserve deficiency is recovered over the remaining life of the particular asset. The exceptions allowed in the two cited examples related to investment in particular assets used to replace outdated plant and the recovery of the company's investment in those assets only. These special circumstances differ significantly from U S WEST's requested recovery in this proceeding which would permit U S WEST to recover depreciation reserve deficiency for all assets from a few services.

> 3. The Commission has the authority to determine whether a depreciation reserve deficiency exists and to determine the appropriate recovery period for such a deficiency. Such determinations involve other considerations not present in this arbitration as the Commission will have to apply a different standard for decision-making than is required for arbitration of unresolved issues according to the 1996 Act. Furthermore, U S WEST has not provided sufficient information in this Docket to enable the Commission to determine either the magnitude of its alleged deficiency or an appropriate amortization period. Because there is no support in the record for such recovery, U S WEST's request to recover this alleged cost in rate elements for local switching and tandem switching must be denied.
>
> 4. The Commission finds that the arbitration order should adopt the rates as proposed by U S WEST in its October 1, 1996 Response and subsequently accepted by Western. U S WEST may only recover a depreciation reserve deficiency if the Commission has determined that a depreciation reserve deficiency exists and that embedded costing is the appropriate cost model.

The evidentiary support presented by U S WEST in this Docket, for recovery of the depreciation reserve deficiency, is no different from the evidence presented by U S WEST in the Western Wireless filing; therefore, the Commission's conclusion regarding its recovery must be the same. U S WEST's proposal to recover its depreciation reserve deficiency is denied.

Finally, we will not deaverage rates for unbundled network elements at this time. The FCC's geographic deaveraging requirements have been stayed by the 8th Circuit and we need not follow them. Moreover, the record is deficient on the policy and market impacts of deaveraging. Geographic deaveraging of network elements should be included as an issue in the generic U S WEST costing and pricing proceeding.

1. Issue 42 - Pricing: Electronic Interfaces.

AT&T contends that OSSs must be priced at TELRIC plus a reasonable allocation of forward-looking common costs. AT&T suggested that all costs associated with providing electronic interfaces should be included in the TELRIC price charged by U S WEST. AT&T argues that when properly calculated, the recurring TELRIC prices will allow U S WEST to recover all costs of providing a particular element, both initial and ongoing. However, in Ms.

Starr's testimony for AT&T, she stated that AT&T does agree that certain transaction fees may be appropriately recovered on a one-time basis.

U S WEST agrees that ongoing fees should be set at TELRIC, but has not calculated this figure. U S WEST disagrees with AT&T's position on how initial set-up fees, etc., should be recovered. Instead of including these fees in the recurring TELRIC price, U S WEST believes they should be recovered through initial access fees.

Neither party has proposed any specific prices for electronic interfaces to access U S WEST's Operations Support Systems, and both seem to agree that these prices will be established at a later date. The parties also seem to agree that, at least in some cases, costs may be recovered through one-time charges.

We find there are at least two cost distinctions at issue, including (1) general one time costs associated with developing the gateway and establishing electronic interfaces that will accommodate all CLECs, and (2) non-recurring "transactions costs" associated with accommodating individual CLECs. We find the record contains insufficient information with which to prescribe specific rate designs, but in general, principles of cost causation should be followed. Nonrecurring charges to establish the electronic interfaces should be allocated efficiently among the carriers involved. Recurring charges should be based on economic costs recovered through recurring charges. Nonrecurring costs can either be recovered through nonrecurring charges or recurring charges, depending on the circumstances involved. Although it is likely that U S WEST's rate design for access to its OSSs ultimately will include a nonrecurring component, more information is needed about the nature and magnitude of the costs involved prior to a final resolution of this issue.

2. Issue 46 - Pricing for Interim Number Portability.

AT&T advocates the "New York State" mechanism of number portability cost recovery which was cited by the FCC as a mechanism that complies with the 1996 Act's competitive neutrality requirement for such cost recovery. This method uses a two-step formula that calculates the annual charge billed to each new entrant. The first step calculates the charge per working telephone number, and the second step derives the charge per new LEC. However, according to AT&T, to the extent this formula cannot be implemented until U S WEST produces relevant information, each local service provider should pay its own costs and U S WEST should be required to provide the information necessary for the use of the formula as soon as possible.

U S WEST disagrees with AT&T's proposal, and explains that it has substantial concerns with the FCC's cost recovery rules because it believes the rules will require it to bear almost all the costs. U S WEST contends that the FCC's rules represent an impermissible preemption of this Commission's authority, and urges the Commission to approve its cost recovery mechanism rather than AT&T's. U S WEST's cost recovery proposals include various nonrecurring and recurring charges, and differentiate between occasions when U S WEST transports the "ported" calls from its end office to AT&T's end office, and when AT&T obtains collocation at U S WEST's end office and provides its own transport to its end office.

The 1996 Act provides for FCC jurisdiction for number portability. This is one of the few areas which Congress expressly authorized the FCC to preempt the states' jurisdiction. Section 252(e)(2) of the Act provides, "The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [Federal Communications] Commission."

The FCC established requirements for methods of interim number portability cost recovery. The method proposed by AT&T is the method set forth in ¶ 136 of the FCC Interconnection Order. Although U S WEST seems to argue that the FCC does not have jurisdiction over cost recovery of number portability, it did not rebut AT&T's assertion that its proposal is consistent with the FCC's rules. The Commission finds that AT&T's proposals are consistent with the FCC's requirements, and adopts them.

3. **Issue 67, Issue 70 and Issue 71 - Costs U S WEST May Recover, Transport Charges, and Charge for Establishing Network**.

Issues 67, 70 and 71 include both parties' positions regarding the costs U S WEST may recover and the rate design of interconnection and unbundled network elements. Generally, AT&T claims that U S WEST's prices must be based on the TELRIC methodology and U S

WEST must not be permitted to impose charges (such as "development fees") other than those directly attributable to the provision of a given element or service. U S WEST argues that the recovery of costs should not be limited to forward-looking costs, or TELRIC, but should include recovery of "actual costs."

Both AT&T and U S WEST have proposed prices for numerous elements, types of interconnection, collocation, and other services and procedures. They have each provided some support for their proposals in the form of summaries of the results of their respective cost models, as well as descriptions of the inputs and methodologies of the models. The parties have also reviewed and critiqued each others' models and in some cases, performed some sensitivity analyses using what they thought were more laudable inputs. The results of the parties' models differ drastically, therefore, the dispute on this issue is which model should be used, and what is the appropriate prices for the unbundled elements.

Hatfield vs. U S WEST's TELRIC Model--As described above, both U S WEST and AT&T have strongly argued against the use of each other's models in favor of their own model to establish the various rates to be charged by U S WEST. The Commission has significant concern over the use of either model, as presented in this proceeding, to establish permanent rates, but believes the Hatfield Model provides the most reasonable rates for interim purposes. We are concerned with U S WEST's apparent mixture of costing perspectives. While U S WEST professes to embrace the TELRIC methodology, and testified that its cost studies conform to the methodology as described in the FCC's Interconnection Order, U S WEST also argues that the Commission adopt the results of its model to allow the recovery of U S WEST's embedded costs. In addition, U S WEST's studies do not seem to be very "user friendly" for purposes of understanding how all of the factors used in the studies were developed.

The Hatfield Model also appears to have its share of flaws, but it generally conforms better to the TELRIC methodology (which even U S WEST seems to advocate as the appropriate methodology) than U S WEST's TELRIC studies. We recommend adopting AT&T's proposed prices on an interim basis for any elements that were not addressed in other issues. These elements include the following: NID, Port, Local Switching, Tandem Switching, Transport, Signaling Links, Signaling Transfer Points, Signal Control Points/Databases, Collocation and Local Service Provider Change Charge ($5.00 as originally proposed).

Loop Rates--As stated above, both U S WEST and AT&T have strongly argued against the use of each other's models in favor of their own model to calculate U S WEST's loop costs and rates. The parties provided fairly extensive testimony regarding the plausibility of various inputs into the loop cost studies. We conclude the Hatfield Model, with revised inputs, can provide reasonable rates for interim purposes. The Commission requested that AT&T rerun its model with the following revisions: (1) a change in the corporate overhead factor from 10 percent to 14 percent; (2) changing the structure sharing assumptions for buried and underground feeder and distribution cable from 33 percent to 66 percent; (3) an increase in the number of distribution cables per census block density group; (4) an increase of the network operations factor from 70 percent to 85 percent; and (5) a decrease in the number of special access lines. As a result of these changes, the Hatfield Model calculates the following monthly aggregate loop and sub-loop prices: 1) the total loop price (including the NID) = $27.41; 2) the loop distribution price (including the NID) = $20/40; 3) the loop concentration price = $2.35; and 4) the loop feeder price = $4.65. The Commission adopts these revised prices for interim purposes.

Collocation Rates--AT&T did not perform any cost studies to determine collocation prices in this proceeding, but instead recommended the Commission adopt the physical collocation prices proposed by the Oregon PUC staff in an Oregon PUC proceeding, and the virtual collocation prices ordered by the Oregon PUC in the same proceeding. U S WEST has proposed it own collocation prices that it explains were developed in compliance with the FCC's TELRIC pricing rules. U S WEST also provided a comparison of interstate collocation prices of seven local exchange companies, on an aggregate, per DS1 price basis. The comparison indicated that U S WEST's price proposals was reasonable.

The Commission adopts U S WEST's proposed collocation prices, for interim purposes, until it conducts an investigation of collocation costing/pricing practices and policies. The Commission finds that these interim prices shall be subject to a true-up once permanent rates are determined.

L. Contract Term and Other Miscellaneous Provisions (Issues 78, 79).

1. Issue 78 - Contract Term.

Both AT&T and U S WEST oppose the six month term for length of the contract which was proposed by Mr. Buckalew, MCC's witness. AT&T contends that it should be a sufficiently long period of time to allow the planning required for its broad-based market entry. AT&T proposes a five year contract term as reasonable given the difficulties of negotiating with a competitor and the length of time it will take for competition to develop in Montana. U S WEST has offered a two year contract term.

Commission Decision: The Commission finds that a two year contract term is sufficient. After two years, many of the questions as yet unanswered about the development of competition in Montana will no longer be speculative. Because the telecommunications industry is undergoing so many and such extreme changes at present, opting for a lengthier contract seems precipitous. Many things can change in two years and we do not think it prudent to require the parties to lock-in to a longer contract at this time.

2. Issue 79 - Definitions.

Both U S WEST and AT&T include a "definitions" section as well as numerous additional definitions and descriptions throughout their respective contracts. U S WEST claims that its definitions are sufficient and AT&T's definitions are too specific and detailed. According to U S WEST, its contract permits the parties to work cooperatively to resolve issues such as definitions of technical matters, using the dispute resolution process if necessary. AT&T counters that its definitions are necessary to provide certainty and common understanding necessary for an effective agreement that minimizes disputes.

As this issue as developed by the parties does not seem to be tied to specific instances as much as the contract form as a whole, it is reasonable to adopt the definitions included throughout the AT&T contract. We conclude that adopting U S WEST's definitions and AT&T's contract would present an unworkable solution and therefore choose AT&T's position on this issue.

RECONSIDERATION

Both AT&T and U S WEST have informally indicated that they may be filing motions for reconsideration following issuance of this order and requested that the 10-day period for filing a motion for reconsideration with supporting brief should be extended. We agree that the complexity and uniqueness of this case, as well as the potential effect on other telecommunications providers and their customers, constitutes good cause for which a waiver of the Commission's 10-day rule warrants special consideration and predetermination. The Commission may waive any of its rules for good cause and as justice may require. ARM 38.2.305. The Commission may also extend the time limits for taking any action required by its rules for good cause shown.

We conclude that good cause exists and several factors warrant such action. First, the Federal Act places stringent time limits on the Commission during which the Commission must decide arbitration issues and this proceeding involved numerous, complex issues. Second, this is the first major arbitration proceeding conducted by this Commission since the Telecommunications Act of 1996 was passed. Third, the potential effect on other telecommunications carriers in Montana should be considered. Finally, there was much confusion generated by the record relating to which issues had been resolved and which still required Commission resolution.

The date for filing motions for reconsideration should be extended. Instead of the 10-day time limit for filing a motion for reconsideration, it is appropriate to extend that deadline until April 10, 1997. It is also appropriate to permit a 10-day period for responses to a motion for reconsideration. Responses will be due by April 21, 1997.

CONCLUSIONS OF LAW

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST and AT&T are public utilities offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and

manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally,* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the* Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the state agency in Montana charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

4. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

5. The 1996 Act permits either party to a negotiation pursuant to 47 U.S.C. § 251 to petition this Commission to arbitrate any open issues in the negotiation of an interconnection contract, according to the parameters included in 47 U.S.C. § 252(b)(1).

6. Arbitration by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(b)(4)(A) limits the Commission's consideration of a petition for arbitration to the issues set forth in the petition and the response and to imposing appropriate conditions as required to implement § 251(c) upon the parties to the agreement. Section 252(b)(4)(C) requires the Commission to conclude the resolution of any unresolved issues in this Docket not later than March 20, 1997, nine months after the date on which U S WEST received AT&T's request for arbitration.

7. In resolving by arbitrating under 47 U.S.C. § 252(b) and imposing conditions upon the parties to the agreement, the Commission is required to (1) ensure that the resolution and conditions meet the requirements of § 251, including the FCC regulations prescribed pursuant to § 251; (2) establish rates for interconnection, services, or network elements according to the pricing standards in subsection (d); and (3) provide a schedule for implementation of the

terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c). The resolution of the disputed issues in this Docket meets the requirements of 47 U.S.C. § 252(c).

8. Section 251 does not provide that telecommunications carriers other than ILECs have a duty to provide access to their poles, ducts, conduit or rights of way, and that issue may not be addressed in this arbitration. Congress has permitted states to preempt the FCC for regulating of pole attachments, ducts, conduit and rights of way. 47 U.S.C. § 224. The Montana Public Service Commission has not preempted federal law as permitted by § 224 and, therefore, has no jurisdiction to require AT&T to permit reciprocal access by U S WEST to its poles, ducts, conduits and rights of way.

9. The FCC's regulations adopted to implement § 251 of the Telecommunications Act of 1996 are binding on this Commission, except the sections relating to the pricing and the "pick and choose" rules which have been stayed by the U.S. Court of Appeals for the Eighth Circuit pending consolidated appeals of the FCC Interconnection Order.

10. The Commission properly decides all issues presented by the parties, including disputes regarding the form of the contract, the structure of the contract, and contract language. Section 252(c) of the 1996 Act does not limit the matters that may be arbitrated by the Commission, except the express provision that requires state commissions to limit consideration to the issues set forth by the parties in the petition and the response. 47 U.S.C. § 252 also does not limit the issues that the parties may request the Commission to arbitrate.

11. The Commission has the authority to adopt a liquidated damages clause in an agreement and to impose such a contract term in resolving issues if one of the parties has identified such as an "open issue."

12. Where the Commission has regulatory jurisdiction, it must apply federal law as well as state law, and where Congress has preempted state law, the Federal law prevails. *See* FERC v. Mississippi, 102 S.Ct. 2126 (1982).

13. The Commission has discretion to extend time limits prescribed by its own rules for good cause. ARM 38.2.312. The Commission may waive the application of any rule for good cause and as justice may require, except where precluded by statute. ARM 38.2.305.

ORDER

THEREFORE, based upon the foregoing, it is ORDERED that the issues presented for Commission arbitration are resolved as set forth above and as follows:

1. AT&T's Second Motion to Compel and for Sanctions and U S WEST's Motion to Compel are denied;

2. the issues submitted for arbitration by AT&T Communications of the Mountain States, Inc. and U S WEST Communications, Inc. are resolved as set forth in the body of this order;

3. the parties shall implement the agreement according to the schedule provided for in individual contract terms, following Commission approval of the executed agreement;

4. the rates for interconnection, services and network elements and for any other items so described in this Order shall apply on an interim basis pending the outcome of a generic costing and pricing proceeding for U S WEST;

5. he Commission will initiate a generic docket to review and establish permanent minimum quality of service standards and measurements to be applied uniformly throughout the industry;

6. U S WEST may not at this time recover its alleged depreciation reserve deficiency in transport and termination charges;

7. the effective date of the rates established in this proceeding shall be the date the Commission approves the final agreement executed by the parties, including the arbitrated terms and conditions and the negotiated terms and conditions;

8. the date by which motions for reconsideration must be filed is April 10, 1997, and the date by which responses to motions for reconsideration must be filed is April 21, 1997; and

9. the 10-day automatic denial of motions for reconsideration is waived for this proceeding.

IT IS FURTHER ORDERED that if no motion for reconsideration is filed by either party during the time provided, a single agreement incorporating the provisions of this Order shall be filed with the Commission for approval within 45 days of service of this ORDER.

DONE AND DATED this 19th day of March, 1997, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any party may request the Commission to reconsider this decision. A motion to reconsider must be filed by April 10, 1997. See ARM 38.2.4806 and this Order.